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We give space, in this issue, to a letter from Mr. George Chase, Dean of the New York Law School, in which that gentleman undertakes to correct some misstatements alleged to have been made in an article in the October number of the *Harvard Law Review*, concerning the methods of instruction at the New York Law School. We publish the letter, as a matter of fairness, in order to give the New York Law School a chance to be heard, the letter of Mr. Chase having been, as we are told, refused publication in the *Harvard Law Review*, to whom it is addressed. We have no desire to enter the lists as a champion of the New York or any other law school. We are, however, free to confess ourselves as adherents of what is known as the "Harvard method" of legal instruction, which had its origin at the Harvard Law School, though our opinion on that subject may be prejudiced by the fact that we received our legal education at that institution. We do not believe, however, that that system differs in any material regard from that now employed at Columbia or the New York Law School. In fact, the tendency of modern legal instruction seems to be in the direction of recitations, instead of lectures, and has as its basis the study and application of principles, as illustrated by the adjudicated cases, rather than the "cramming" from text-books, or the mere lectures of the professor. Whether it be called the "Harvard" or the "Dwight" method, though each may have its distinctive features in the matter of details, it is, in substance, much the same thing.

The President, as well as the nation, is to be congratulated upon the excellence of the former's selections for the new bench of the United States Circuit Court of Appeals. Though but six of the vacant judgeships were filled, we have no reason to doubt that the remainder will be selected with the same care and discrimination. Beyond the fact that the selections so far made are in every instance exceptionally good, a striking and satisfactory feature is the fact that two of the six appointees are Democrats. That the President should so far have ignored the urgent demands of his party is a healthy sign of the times, and leads us to hope that the day is not far distant when all judicial officers will be selected without reference to party associations.

Mr. William L. Putnam, of Maine, appointed for the first judicial circuit, is a lawyer of high standing and a prominent Democrat. His fitness for the bench may be understood from the fact that he was offered a judgeship of the State supreme court a few years ago, and that the two Republican senators from Maine earnestly recommended his appointment as Chief Justice of the United States at the time of Mr. Fuller's selection.

Nathan Shipman, of Connecticut, nominated for the second judicial circuit, has since 1873 continuously served as United States district judge for Connecticut. Besides being a man of fine ability and well fitted for his new duties, his appointment is in the nature of a promotion and reward for faithful services performed.

Mr. Geo. M. Dallas, of Pennsylvania, appointed for the third judicial circuit, is an honored lawyer of Philadelphia, whose success and eminence at the bar has been pronounced, and who commands the respect and confidence of all. He is in politics a Democrat, and is said to be a man having a peculiar aptitude for the judicial office.

Nathan Goff, of West Virginia, appointed for the fourth judicial circuit, is more or less known to the public, having with credit and success occupied various official positions. He is known as a man of fine legal ability and sterling worth.

The appointee for the fifth judicial circuit, William H. Taft, is, in a sense, a legal or rather a judicial phenomenon. He is not yet thirty-five years of age, and has been a member of the bar but little over ten years, and yet, during that period, he has shown such aptitude in his profession, that he has successively held the positions of prosecuting attorney of Cincinnati, judge of the superior court of that city and Solicitor-General of the United States, which position he now holds. That at so early an age, he should have

been deemed worthy of selection to so exalted a position as judge of the United States Circuit Court of Appeals, is not only a great compliment to him, but shows that he has undoubted fitness for the office.

William A. Woods, of Indiana, appointed for the sixth judicial circuit, has for some years honorably and creditably filled the position of United States Judge for the District of Indiana. His appointment, like that of Judge Shipman, is in the line of promotion, and will give general satisfaction.

NOTES OF RECENT DECISIONS.

TELEPHONE COMPANIES—DUTY TO FURNISH SERVICE—CONTRACT RESTRICTING USE OF PATENTED DEVICE.—In State v. Delaware & A. Telegraph & Telephone Co., 47 Fed. Rep. 633, decided by the United States Circuit Court, District of Delaware, the respondent, a telephone company, maintaining the only telephone exchange in a city which was connected with telephones in the places of business and residences of its subscribers, refused, on demand, to furnish telephone instruments to relator, a telegraph company, which was operating a telegraph line within the same territory, as part of a large system, except on condition that the instruments should not be used as an adjunct to the receiving and transmitting of telegraphic messages, although respondent had furnished such telephonic facilities to another telegraph company, a competitor with relator in the same city, without such condition. The court held that respondent was a common carrier, offering to the public the use of its telephonic system for the rapid conveyance of oral messages, and, as such, was subject to the duty of serving all persons alike, impartially and without unreasonable discrimination; and that the right to equal facilities for the use of such public system extended to telegraph companies as well as to individuals.

Respondent alleged that it was a mere licensee of the owner of patents for the telephones; that it was forbidden by the terms of its license to supply a telephone instrument to any telegraph company, to be used for telegraphic purposes, without the consent of its licensor; and that it had furnished a telephone to such other telegraph company under a general order from the owner of the patent, in pursuance of a contract between such owner and such telegraph company for an exclusive license to the latter for a term of years to use the telephone in receiving and transmitting messages. It was held that this was no justification for the refusal to comply with the demand of relator, such contract being void as against public policy. The patented device having been employed for a public use, by a common carrier, in the prosecution of its business, relator was entitled to use it on the same terms as others in the same class.

DIVORCE — ADULTERY — MARRIAGE. — In Franklin v. Franklin, 28 N. E. Rep. 681, the Supreme Judicial Court of Massachusetts holds that a husband may obtain a divorce for his wife's adultery, notwithstanding that, in pursuance of an agreement under which they were married, they have never lived together as husband and wife. Knowlton, J., says:

> The libelant and libelee became husband and wife by virtue of a lawful marriage. The agreement that they would not live together had no effect upon the marriage contract entered into in regular form in the presence of a magistrate or minister authorized to solemnize marriages. It is against the policy of the law that the validity of a contract of marriage or its effect upon the *status* of the parties should be in any way affected by their preliminary or collateral agreements. Barnett v. Kimmell, 35 Pa. St. 13; Harrod v. Harrod, 1 Kay & J. 4, 16. The consummation of a marriage by coition is not necessary to its validity. The *status* of the parties is fixed in law when the marriage contract is entered into in the manner prescribed by the statutes in relation to the solemnization of marriages. Eaton v. Eaton, 122 Mass. 276; Dies v. Winne, 7 Wend. 47; Dumaresly v. Fishly, 3 A. K. Marsh. 368; Patrick v. Patrick, 3 Phillim. Ecc. 496; Dalrymple v. Dalrymple, 2 Hagg. Const. 54. The libelant is not guilty of such a marital wrong as will prevent him from obtaining a divorce on the ground of his wife's adultery. The parties lived apart by mutual consent, and on the facts reported neither could have obtained a divorce from the other on the ground of desertion. In such a separation there was no desertion within the meaning of the word in the statutes in relation to divorce. Lea v. Lea, 8 Allen, 419; Thompson v. Thompson, 1 Swab. & T. 231; Cooper v. Cooper, 17 Mich. 205. Living apart by agreement is no bar to a suit for divorce brought by either against the other on the ground of adultery. A voluntary separation is not a license to commit adultery; and it has uniformly been held that, in case of adultery under such circumstances, the innocent party may have a remedy against the other in a suit for a divorce. Morrall v. Morrall, 6 Prob. Div. 98; Beeby v. Beeby,

1 Hagg. Const. 140, note; Mortimer v. Mortimer, 2 Hagg. Const. 310; J. G. v. H. G., 33 Md. 401; Anderson v. Anderson, 1 Edw. Ch. 380. The court has jurisdiction, notwithstanding that the parties have never lived together as man and wife within this commonwealth.

TAXATION —EXEMPTION — MANUFACTURING COMPANIES—ELECTRIC COMPANIES.—The case of Commonwealth v. Northern Electric Light & Power Co., 22 Atl. Rep. 839, decided by the Supreme Court of Pennsylvania, presents a new and interesting question. It is there held that a company generating electricity and selling it to customers for power, illuminating or heating purposes, is not a manufacturing company within the statutes of that State exempting the capital stock of manufacturing companies from taxation. Williams, J., says:

Is a company that produces electricity, and sells it to customers for the generation of light, heat, or power, a manufacturing company, within the meaning of the act of 1885, exempting the capital stock of manufacturing companies from taxation? This case was tried without a jury, and the facts upon which the judgment was based appear in the findings of the court below. One of these, which was based upon the opinion, and largely expressed in the words of an expert electrician, who was called as a witness, asserts that the electricity sold by the company was created by the process adopted by the company. The learned judge says: "The electricity which furnishes the light does not exist until the armature revolves. The revolution of the armature brings into being something that did not exist before,—that is, this electric energy, or energy in this electric form." In the same finding he describes the process by which this product is evolved or created as follows: "Coal is burned under the boilers, producing heat. The heat generates steam in the boilers, which moves the engine. The engine supplies the power by which the armature is made to revolve. The revolution of the armature produces ejectric currents where they did not exist before. The electricity thus generated is carried over wires provided by the company, and delivered to its customers, where it is used to produce light. The process by which electricity is made to furnish light is found to consist of the movement of an electric current from one carbon point to another, which are made part of its circuit. In leaping from one point to another great heat is developed by the energy of the current. This heat liberates or evolves from the carbon a gas, which it burns. The light is thus found to be due partly to the passage of the electric current between the carbon points, and partly to the combustion of the gas furnished by the heated carbons." Notwithstanding these findings, which showed a creation, or "bringing into being where it did not exist before," of the electricity sold by the company, the learned judge held as matter of law that the process was not one of manufacture, because the product was not a material substance. Conceding that the thing sold was "brought into being," made—"manufactured," in the common use of that word—he denied that such making was in a legal sense a manufacture, because it did not appear affirmatively of what the mysterious product was made, and that it was material, as matter is now defined. This conclusion appears to have been drawn from the derivation and definition of the word "manufacture," and is forcibly presented in a learned opinion, in which lexicons and books of reference are largely drawn upon. It is very clear that the word originally meant "hand-made." It is equally clear, in the light of the definitions collated by the learned judge, that its meaning has expanded with the advance of the arts and sciences, until it has come to mean, as a verb, the making of anything by human art or skill (Burrill, Law Dict.), and as a noun, anything made by art or skill (Rap. & L. Law Dict.). The mere appropriation of an article which is furnished by nature is not a manufacture. Thus the liberation of natural gas or oil from the earth, and its transportation to consumers is not a manufacture; but the production of illuminating gas is. Gas-light Co. v. Brooklyn, 89 N. Y. 409; also, Emerson v. Com., 108 Pa. St. 111. The collection, storage, preparation for market, and transportation of ice is not a manufacture, but the production of ice by artificial means is. People v. Ice Co., 99 N. Y. 181, 1 N. E. Rep. 669. A telegraph company produces electricity by artificial means, but it uses it in its own business as a carrier of messages for the public; so does a telephone company. Both receive messages for carriage, and deliver them at the point of destination. They transport for their customers. This company whose character we are considering sells the electricity it makes, or "brings into being," as a commodity. It provides the lamps or appliances for the use of its customers, by means of which the light is produced. It sells them the electricity, measures it as it is delivered, and is paid according to the quantity furnished. Whatever electricity may be, it seems to be absolutely within the power and under the control of the company that brings it into being. It is compelled by the process employed to come into being. It is secured, stored, poured out, or liberated at will. Its manifestations are both seen and felt. It moves with incredible velocity and power. It carries the tones and inflections of the human voice, or moves loaded cars, depending on the volume of the current and the manner of its application. It may be, in the hands of the physician, a soothing remedial agent, and, in the hands of the law, an instrument of execution swifter and surer than the headsman's ax. It may be too early to say just what it is. The scientists whose views the learned judge adopted may be right or wrong. We have no need to decide that question. Laws are written ordinarily in the language of the people, and not in that of science; and, if this case depended on the question on which it turned in the court below, we should be led by the findings of fact to a different conclusion of law from that which was there reached, and which held that this company was a manufacturing company. * * * *

HUSBAND AND WIFE—PURCHASE OF NECESSARIES BY WIFE — EVIDENCE.—The Supreme Court of Minnesota, in Bergh v. Warner, consider an interesting question as to the power of the wife to bind the husband in the purchase of necessaries, holding that if a person sells goods to a wife, he can only hold the husband liable for them either by proof

that he expressly or impliedly authorized the purchase or by proof that he refused or neglected to provide a suitable support for the wife, and that the goods sold were necessaries. The authority of the wife as the husband's agent to purchase goods on his credit may, however, be either express or implied from acts and conduct, as in other cases of agency; and where the goods purchased are such as, in the ordinary arrangement of the husband's household, are required for family use, the presumption is that the wife, if living with her husband, had authority from him to make the purchase. The term "necessaries" in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to preserve life or personal decency, but includes such articles of utility or ornament as are suitable to maintain according to the estate and rank of her husband. Mitchell, J., says:

It is sought in this action to hold the defendant liable for debts contracted by his wife during coverture and cohabitation. The first cause of action is for the price of a pair of diamond earrings, purchased by the wife for her own use; the second is for a small sum for repairing certain articles of her jewelry. The wife has, by virtue of the marriage relation alone, no authority to bind her husband by contracts of a general nature. She may, however, be his agent, and, as such, bind him. This agency is frequently spoken of as being of two kinds—first, that which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessaries which the husband himself has neglected or refused to furnish; second, that which arises from the authority of the husband, expressly or implied conferred, as in other cases. The first of these, sometimes called an "agency in law," or an "agency of necessity," is not accurately speaking, referable to the law of agency; for the liability of the husband in such cases is not at all dependent upon any authority conferred by him. He would, under such circumstances, be liable although the necessaries were furnished to the wife against his express orders. The real foundation of the husband's liability in such cases is the clear legal duty of every husband to support his wife, and supply her with necessaries suitable to her situation and his own circumstances and condition in life. But the wife's authority on this ground to contract debts on the credit of her husband is limited in its extent and nature to the legal requirements fixed for its creation, of the existence of which those persons who assume to deal with the wife must take notice at their peril. If they attempt to hold the husband liable on this ground, the burden of proof is upon them to show—first, that the husband refused or neglected to provide a suitable support for his wife; and, second, that the articles furnished were necessaries. The term "necessaries," in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband.

In regard to the much vexed question as to how it is to be determined, in a given case, whether the articles furnished were necessaries, the general rule adopted is that laid down by Chief Justice Shaw in Davis v. Caldwell, 12 Cush. 512, viz., that it is a question of fact for the jury, unless in a very clear case, where the court would be justified in directing authoritatively that the articles cannot be necessaries. In this case the plaintiff utterly failed to establish a right to recover for the articles sued for in the first cause of action as "necessaries." Conceding, for the sake of argument, that, in view of the estate and rank of the defendant, the trial judge would have been justified in finding as a fact that diamond ear-rings were necessaries; yet, so far from their being any evidence that the defendant neglected or refused to provide his wife a suitable support, it affirmatively appeared that he provided for her amply, and even liberally.

The only other ground upon which the defendant could be held liable was by proof that he expressly or impliedly authorized his wife to purchase the articles on his credit. This is purely and simply a question of agency, which rests upon the same considerations which control the creation and existence of the relation of principal and agent between other persons. The ordinary rules as to actual and ostensible agency must be applied. The agency of the wife, if it exists, must be by virtue of the authorization of the husband, and this may, as in other cases, be express or implied Her authority, however, when implied, is to be implied from acts and conduct, and not from her position as wife alone. Of course, the husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on other grounds of universal application. By having, without objection, permitted his wife to contract other bills of a similar nature on his credit, or by payment of such bills previously incurred, and thus impliedly recognizing her authority to contract them, a husband may have clothed his wife with an ostensible agency and apparent authority to contract the bill sued on, so as to render him liable, although she had no actual authority, just as any principal would be liable under like circumstances. It is also true that where the wife is living with her husband, she as the head and manager of his household is presumed to have authority from him to order on his credit such goods or services as, in the ordinary arrangement of her husband's household, are required for family use. Flynn v. Messenger, 28 Minn. 208, 9 N. W. Rep. 759; Wagner v. Nagel, 33 Minn. 348, 23 N. W. Rep. 308. This presumption is founded upon the well-known fact that, in modern society, almost universally, the wife, as the manager of the household, is clothed with authority thus to pledge her husband's credit for articles of ordinary household use. But the articles sued for here are not of that character, and no such presumption would arise from the mere fact that the parties were living together as husband and wife. To hold the husband liable there must have been some affirmative proof of authority from him, either express or implied, from his acts and conduct. In this case there is an entire absence of any evidence of express authority. Indeed, the evidence tends quite strongly to show that it was his expressed wish that his wife would incur no bills, and that his monthly allowance to her of "pin-money" was intended to avoid any oc-

casion for her doing so. The evidence of acts and conduct on part of defendant tending to show that he had clothed his wife with apparent or ostensible authority to buy any such articles on his credit was exceedingly slight. The mere fact that he furnished his wife with expensive wearing apparel had little, if any, tendency to prove any such fact.

CRIMINAL LAW—FORMER ACQUITTAL—COLLATERAL ATTACK.—In Shideler v. State, decided by the Supreme Court of Indiana, defendant was arrested on an information charging him with bigamy, was tried by the court without a jury, and was acquitted. The information was filed by the prosecuting attorney, who represented the State at the trial, and the proceedings were regular. Defendant was afterwards indicted for the same offense, and entered a plea of former acquittal. The State replied that such acquittal was procured through fraud in bribing the prosecuting attorney. It was held that the judgment of acquittal was not void because of such fraud, and could not be collaterally attacked. McBride, J., says:

The judgment of conviction can only be sustained by treating the judgment of acquittal in the first proceeding as absolutely void, and ignoring it. Can this be done? Waiving any question as to the technical sufficiency of the reply, the facts, as the State claims to have established them by evidence on the trial, and which are relied upon as sufficient to justify the collateral attack on the judgment of acquittal, are substantially as follows: That, after the commencement of the first prosecution, persons acting in the interest of the appellant corrupted the prosecuting attorney by paying him a bribe of $500 to connive at appellant's escape from punishment; that although the fact of the appellant's guilt was beyond controversy, and the evidence ample to secure a conviction, the witnesses for the State, who had arranged with the prosecutor to come, and who would have come at any time on notice, were not subpœnaed or in any other way notified of the time of the trial, and were none of them present; that the prosecutor and the appellant went into court together without witnesses, a plea of not guilty was entered, and the case submitted to the court for trial without a jury; that the only evidence adduced was the statement of the accused, and two *ex parte* affidavits produced by him; that this was all in accordance with said corrupt arrangement to secure the appellant's escape from punishment; and that it was upon such presentation of the case alone that the finding and judgment of acquittal were based. It has been many times decided, and may be regarded as settled law, that if one procures himself to be prosecuted for an offense which he has committed, thinking to get off with slight punishment or none, and to thus bar a prosecution in good faith by the State for the same offense, if the proceeding is really managed by himself, either directly or through the agency of another, and the State, while a party in name, is not so in fact, and has no actual agency in the matter, the judgment thus procured is void, and affords no protection. 1 Bish. Crim. Law, § 1010; Archb. Crim. Pr. 352, note by the American editor; Watkins v. State, 68 Ind. 427; Halloran v. State, 80 Ind. 586; Ice v. State, 123 Ind. 590, 24 N. E. Rep. 682; Gresley v. State, 123 Ind. 72, 24 N. E. Rep. 332; State v. Lowry, 1 Swan. 34; State v. Clenny, 1 Head. 270; State v. Colvin, 11 Humph. 599; State v. Yarbrough, 1 Hawks, 78; Com. v. Dascom, 111 Mass. 404; Com. v. Alderman, 4 Mass. 477; State v. Little, 1 N. H. 257; State v. Wakefield, 60 Vt. 618, 15 Atl. Rep. 181; Com. v. Jackson, 2 Va. Cas. 501; State v. Epps, 4 Sneed. 552; State v. Green, 16 Iowa, 239; State v. Atkinson, 9 Humph. 677; State v. Brown, 16 Conn. 54; State v. Simpson, 28 Minn. 66; McFarland v. State, 68 Wis. 400, 32 N. W. Rep. 226; State v. Cole, 48 Mo. 70. While the judgment in such cases as these above cited are fraudulently procured, and are frequently said to be void because of the fraud practiced, it is apparent that a better reason for holding them void and not binding upon the State is that the State is not a party to them. The State can no more be bound by a judgment to which it is not a party than a citizen of the State can. If A and B engage in litigation, and during its pendency B corrupts A's attorney, and through him procures the rendition of a judgment unjust to A, and inuring to B's advantage, although the judgment is thus tainted by fraud, if the court had jurisdiction of the subject-matter, and the proceedings are apparently fair and regular on their face, the judgment is not void, and cannot be attacked collaterally. A judgment rendered under such circumstances is voidable, and the court rendering it will promptly set it aside on the fraud being shown. Freem. Judgm. 99.

A court of equity will also give relief from a judgment thus procured. Black Judgm. 919; Freem. Judgm. 486 *et seq.*; Pom. Eq. Jur. 919. The attack, however, must be direct, and not collateral. Black Judgm. 299 *et seq.*, and cases cited. If, however, B, without the knowledge or consent of A, and wholly without authority, personates him or procures another to personate him, and prosecutes a suit in A's name, but actually in the interest of B, whereby a judgment is rendered to the disadvantage of A, and advantage of B, it would be contrary to all principles of justice to hold that A was in any manner or to any extent bound by such judgment. Never having been a party to it, or having any notice or knowledge of the proceeding, he may treat it as a nullity, and may attack it collaterally, as the State was allowed to do in each of the several cases cited. In speaking of such cases, Bishop well says: "He [the defendant] is, while thus holding his fate in his own hands, in no jeopardy. The plaintiff State is no party in fact, but only such in name. The judge is imposed upon, indeed, yet in point of law adjudicates nothing. All is a mere puppet show, and every wire moved by the defendant himself." 1 Bish. Crim. Law, § 1010. The Supreme Court of New Hampshire, in State v. Little, *supra*, suggest a query whether a judgment can ever be regarded as fraudulent and void when the State has been actually represented by its proper prosecuting officer. We have been unable to find any case in the books, presenting the peculiar features of the case at bar, where the courts have considered the sufficiency of a judgment thus procured as a defense to another prosecution for crime. Here the first prosecution was commenced regularly and in good faith, and the State was represented throughout by its regularly authorized officer and agent, the prosecuting attorney. The charge is that pending the prosecution the prosecuting attorney was corrupted, and paid to secure an acquittal instead of a conviction. So far as disclosed by the record, the prosecution proceeds with

regularity throughout. The arraignment, plea and submission are regular, but the trial is a farce. The distinction between such a case and those cited is at once apparent, and is very broad. While the baseness of an officer who will thus prostitute his office cannot be too severely condemned, and while he should receive prompt and severe punishment, our indignation should not be allowed to blind us as to the principle involved. Our anxiety to rectify the wrong done, and punish the wrong-doer, should not lead us to violate established principles of law in our efforts to do so.

SUFFICIENCY OF THE MEMORANDUM UNDER THE STATUTE OF FRAUDS.

1. *Contract for Sale of Personal Property at Common Law.*—At common law a bargain and sale of personal property is defined to be "a transfer of the absolute or general property in a thing for a price in money."[1] And while, if the consideration be other than money—as the giving of other goods in exchange for the thing bought—it would constitute a technical barter, the legal effect is generally the same. The same rule of law applies to both.[2] All that was essential at common law to the validity of a sale of personal property "was the mutual assent of the parties to the contract. As soon as it was shown by any evidence, verbal or written, that it was agreed, by mutual assent, that the one should transfer the absolute property in the thing to the other for a money price, the contract was completely proven, and binding on the parties."[3] "The only things essential to the valid sale of personal property at common law were a proper subject, a price, and the consent of the contracting parties, and if these concurred the sale was complete and the title passed without anything more."[4] Not until the adoption of the statute of 29 Charles, 2, ch. 3, known as the "statute of frauds," did the matter of actual delivery become an important quality in the consideration of such contracts. The corresponding provision is found in the statutes of most of the American States.[5]

2. *The Statute.*—The statute of frauds declares that no action shall be brought upon certain specified contracts, "unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized."[6] The section of the statute with reference to the sale of goods is substantially the same, except in the use of the plural "parties to be charged."[7] Oral contracts for the sale of lands or goods were valid before the passage of the statute. The statute does not make the contract void in the sense that an illegal contract is void, but simply makes it unenforceable. The bar of the statute is removed by the production of a writing containing the terms of the oral contract, and authenticated by the signature of the party to be charged.

3. *When Memorandum Must be Made.*—It seems to be the settled rule that the memorandum may be made at any time subsequent to the formation of the contract, and before action brought,[8] except in sales by auctioneers, which is considered in the next paragraph. The time of making the memorandum may be shown by extrinsic evidence, even in contradiction of the date upon the memorandum itself.[9] The statute does not require the contract of sale to be in writing, but only a note or memorandum thereof in writing. The suit is not founded upon the writing; it is based on the oral contract. It would seem that the statute only intended to secure written evidence of the contract, and not leave it to "slippery memory."[10] "It would seem rational to hold that it (the memorandum) may be made even after suit is brought, as long as the trial has not been had."[11] "But there appears to have been no direct decision to that effect, and the weight of opinion as well as reason is against it."[12]

4. *Same—Auction Sales.*—With reference

[1] Benjamin on Sales (4th. Am. ed.), 1.

[2] Benjamin on Sales (4th. Am. ed.), 3; Commonwealth v. Clark, 14 Gray (Mass.), 371.

[3] Benjamin on Sales (4th. Am. ed.), 5 and 6.

[4] Per Leonard, J., in Cunningham v. Ashbrook, 20 Mo. 556.

[5] See R. S. 1889 of Missouri, § 5187; Tiedeman on Sales, § 55. See Nance v. Metcalfe, 19 Mo. App. 183.

[6] See R. S. Mo. 1889, § 5186.

[7] See R. S. Mo. 1889, § 5187; Tiedeman on Sales, § 72; Browne on the Statute of Frauds, p. 427, § 345.

[8] Bird v. Monroe, 66 Mo. 347; Bill v. Bament, 9 M. & W. 36; Williams v. Bacon, 2 Gray (Mass.), 387; Sirvewright v. Archibald, 172 B. 107, 114 Hewes v. Taylor, 70 Pa. St. 387.

Hewes v. Taylor, 70 Pa. St. 387.

[10] See Thornton v. Kempsey, 5 Taunt. 786; Fricker v. Thomlinson, 1 Man. & G. 772; Gibson v. Holland, L. R. 1 C. P. 1.

[11] Tiedeman on Sales, § 72, citing Benjamin on Sales, Bennett's notes (ed. 1888) pp. 199, 200.

[12] Browne on the Statute of Frauds, § 352, p. 435. See Rose v. Cunynghame, 11 Ves. 550; Bill v. Bament, 9 M. & W. 36.

to sales made by auctioneers, it seems that the rule of the last paragraph does not apply, for the decisions hold that an auctioneer's entry, to be valid as a memorandum, must be made contemporaneously with the sale;[13] therefore, an entry made a month or more after the sale will not satisfy the statute.[14] There are decisions which hold that the memorandum will answer if made on the day of the sale, shortly after it.[15] The language of many of the cases, apparently uncontradicted, is, that the name of the purchaser must be written down by him (the auctioneer) *immediately* after the announcement of the bid and the descent of his hammer; by which we should understand, before proceeding to put up another article.[16] Men are not to be "ensnared by contracts subsequently reduced to writing by their agents."[17] This remark being "casually made," is not regarded by Mr. Browne as of much consequence.[18] The cases appear to draw a distinction between the auctioneer's agency for the seller, and his agency for the buyer. In the former, the auctioneer is permitted to sign the memorandum some time after the sale, but in the latter, he must do this contemporaneously with the sale.[19]

5. *By Whom Should the Memorandum be Made?*—The agents who are intrusted with the contract may make the memorandum. The authority to buy or sell implies the authority to consummate the transaction and bind the parties by the proper writing. But it is at all times within the power of the principal to revoke the agent's authority to sign before he has executed the signature.[20] Sometimes an agent will be permitted to execute the memorandum after his express agency is terminated, as such authority would seem to survive.[21] The principal may be bound although the contract is not executed in his name. The law respecting undisclosed principals embraces this rule.[22] A memorandum made by a sheriff or his deputies, and signed by him or his deputies, of a sale under a deed of trust in a partition proceeding is sufficient.[23] This memorandum need not be made by the deputy who made the sale.[24] A memorandum made by an auctioneer's clerk will answer.[25]

6. *To Whom Should the Memorandum be Addressed?*—It is not indispensable to the validity of the note or memorandum that it be addressed to any one, for writings may be appealed to, although they have not passed between the parties to the contract.[26] Entries upon defendant's books will suffice.[27] So, a letter addressed to a third person,[28] or to the defendant's own agent[29] will satisfy the statute.

7. *Form of the Memorandum.*—The form of the memorandum is not material. It may consist of letters,[30] telegrams,[31] subscription lists,[32] or accounts.[33] If the terms of the contract may be gathered from it the statute is satisfied, whatever form it may assume.

8. *Separate Pieces of Paper.*—The agreement is sufficient if it appear by different memoranda; it need not all be contained in one writing. The contract may be made up of several papers, which may be read together as one contract, provided that the paper signed by the party to be bound refers to the others, so as to enable the court to gather the terms of the contract from all

[13] Buckmaster v. Harrop, 13 Ves. per Lord Chancellor Erskine.

[14] White v. Watkins, 23 Mo. 423. See Heidman v. Wolfstein, 12 Mo. App. 366.

[15] Barclay v. Bates, 2 Mo. App. 139.

[16] Browne on the Statute of Frauds, § 353, p. 436.

[17] Smith v. Arnold, 5 Mason, 414, per Mr. Justice Story.

[18] Browne on the Statute of Frauds, § 353, p. 437. See also Price v. Durin, 56 Barb. (N. Y.), 647.

[19] Gill v. Bicknell, 2 Cush. (Mass.) 355; Mews v. Carr, Hurl. & N. 484; Horton v. McCarty, 53 Mo. 394.

[20] Gwathney v. Cason, 74 N. C. 5.

[21] Williams v. Bacon, 2 Gray, 387.

[22] Gowen v. Klaus, 101 Mass. 449; Hunter v. Gidding 97 Mass. 41; Lerned v. Johns, 9 Allen. 419; Dykers v. Townsend, 24 N. Y. 61; Truman v. Loder, 11 A. & E. 587. As to signature by agent, see Browne on Statute of Frauds, §§ 370, 370*a*.

[23] Wiley v. Robert, 27 Mo. 388, 31 Mo. 212.

[24] Barclay v. Bates, 2 Mo. App. 39.

[25] Briggs v. Munchon, 56 Mo. 467; Price v. Durin, 56 Barb. (N. Y.), 647.

[26] Armsby Co. v. Eckerly, 42 Mo. App. 299.

[27] Peabody v. Soyers, 56 N. Y. 230; Argus Co. v. Albany, 55 N. Y. 495; Tufts v. Plymouth, G. M. Co. 14 Allen, 407; Johnson v. Trinity Church, 11 Allen, 123.

[28] Moore v. Mountcastle, 61 Mo. 424; Cunningham v. Williams, 43 Mo. App. 629; Greeley Burnham Gro. Co. v. Capen, 23 Mo. App. 301; Wood v. Davis, 82 Ill. 311.

[29] Kleeman v. Collins, 9 Bush. 467.

[30] Heidman v. Wolfstein, 12 Mo. App. 266; Moore v. Mountcastle, 61 Mo. 424; Thayer v. Luce, 22 Ohio St. 62.

[31] Whaley v. Hinchman, 22 Mo. App. 483.

[32] Boydell v. Drummond, 11 East, 142.

[33] Pierce v. Corf, L. R. 92. B. 210; Hinde v. Whitehouse, 7 East, 558.

when read as a whole.[34] And, if the reference made in the paper signed by the party to the other documents be ambiguous, parol evidence is admissible to explain the ambiguity and identify the document referred to.[35] For the rule is that when a written memorandum of a contract does not purport to be a complete expression of the entire contract, or part of it only is reduced to writing, the matter thus omitted may be supplied by parol evidence,[36] provided the substance of the contract appear from the memorandum itself.[37] The memorandum may be supplemented and made complete by letters written by the parties relating to the transaction;[38] and, in such case, other writings may be appealed to, although they have not passed between the parties to the contract.[39]

9. *Contents of the Memorandum.*—Every material part of the contract should appear from the writing, as the names of the parties the subject-matter of the sale, and the terms and conditions thereof. This is the general rule, but there are apparent exceptions. For instance, the memorandum has been held sufficient, although it did not distinguish the buyer from the seller, nor clearly indicate their relation to the transaction.[40] However, the rule is that the names of both parties must appear as parties to the contract.[41] Initials of names will answer, for oral evidence may be resorted to for the purpose of identification.[42] So, the parties may be designated by descriptive words or phrases, without the use of names or initials,[43] as "vendors,"[44] "proprietors,"[45] or a "trustee selling under a deed of trust."[46] The subject-matter of the contract must clearly appear from the memorandum.[47] If it is land, the property should be so described as to be identified, or the writing should afford the means whereby the identification may be completed by parol evidence.[48] And if goods, the quantity and quality must in some manner appear; however, it is not essential that the exact weight be specified.[49] The requirements as to the consideration of the contract and the credit and time of performance, in the sale of goods, etc, appear in subsequent paragraphs of this article.

10. *Illustrations—Sale of Goods, etc.*—A memorandum of the sale of goods, to be sufficient under the statute of frauds, must state the contract with reasonable certainty, so that its *substance* will appear from the writing itself, without recourse to parol evidence. It is not essential to the validity of such a contract that it should stipulate for any time or place of delivery; but if there be such a stipulation, the memorandum must contain it. "The memorandum must contain all the material terms of the contract. One exception, the only one, is that of the consideration upon which the promise is founded, allowed by most of the American but not by the English courts.[50] The time and place of delivery are material stipulations in all contracts for the purchase and delivery of chattels." If the time and place are not agreed upon, the memorandum will be construed as a contract for delivery in a reasonable time, and at the vendor's customary place. "But when the time or place is stipulated, it goes to the essence of the contract, and must appear in the memorandum."[51] Norton, J., in speaking of the sufficiency of a particular memorandum, and of the admissibility of parol evidence to explain it, puts the general proposition very tersely, as follows: "Parol evdence is clearly inadmissible to contradict, alter or vary a written contract, but when a

[34] Jelks v. Barrett, 52 Miss. 315; Fisher v. Kuhn, 54 Miss. 480; Lee v. Mahony, 9 Iowa, 344; Peck v. Vandemark, 99 N. Y. 29; Rhoades v. Castner, 12 Allen, 132;

[35] Christensen v. Wooley, 41 Mo. App. 53.

[36] O'Neil v. Crain, 67 Mo. 250; Lash v. Parlin, 78 Mo. 391.

[37] Smith v. Shell, 82 Mo. 215, 218.

[38] Heidman v. Wolfstein, 12 Mo. App. 366.

[39] Armsby Co. v. Eckerly, 42 Mo. App. 299.

[40] Salmon Falls M'f'g. Co. v. Goddard, 14 How. 458; Sanborn v. Flagler, 9 Allen, 474; Grafton v. Cummings, 99 U. S. 111; Newell v. Radford, L. R. 3 C. P. 52; See Newberry v. Wall, 84 N. Y. 576; Butler v. Thompson, 92 U. S. 412; Cuddington v. Goddard, 16 Gray, 436; Coate v. Terry, 24 Up. Can. C. P. 271.

[41] Vandenberg v. Spooner, L. R. 1 Ex. 316, 35 L. J. Ex. 201.

[42] Grafton v. Cummings, 99 U. S. 111.

[43] Rossiter v. Miller, 46 L. J. Ch. 228; Thomas v. Brown, 12 B. Div. 714.

[44] Commins v. Scott, 20 Ex. 11. But see Potter v. Duffield, 18 Eq. 4.

[45] Sale v. Lambert, 18 Eq. 1.

[46] Catling v. King, 5 Ch. Div. 660.

[47] May v. Ward, 134 Mass. 127; Waterman v. Meigs, 5 Cush. 497; McElvoy v. Buck, 25 Mich. 434.

[48] Whaley v. Hinchman, 22 Mo. App. 483.

[49] Penniman v. Hartshorn, 13 Mass. 87.

[50] See Tiedeman on Sales, § 76.

[51] Per Henry, J. in Smith v. Shell, 82 Mo. 215, 218; Hawkins v. Chace, 19 Pick. 502; Kriete v. Myer, 61 Md. 558.

written memorandum of a contract does not purport to be a complete expression of the entire contract, or part of it only is reduced to writing, the matter thus omitted may be supplied by parol evidence." In that case, a written request by defendant to plaintiff to secure for them a certain number of hogs was held a sufficient memorandum of a contract to receive and pay for such hogs; also, that parol evidence was admissible to show the price agreed upon.[52] This decision has been expressly approved,[53] and the same doctrine has been announced in other cases;[54] therefore it may be taken as a rule of the Missouri courts upon this subject.[55] If the memorandum of a contract of sale shows the sale of one car of apples, without designating the exact quantity of boxes, or any stipulated time of delivery, and a controversy arises as to these matters, the memorandum may be supplemented by oral evidence on these points.[56] "Sold notes" constitute sufficient memorandum under the statute of frauds, although they may omit to state the time of delivery of the goods sold.[57]

11. *Illustrations—Sale of Land.*—A memorandum of a sale of land at auction is sufficient, which contains the names of the vendor and purchaser, the terms of the sale, the amount bid and paid, and a description of the land sufficient to enable the purchaser, from surrounding facts and circumstances, to identify and locate it. The insertion by the auctioneer, at the time of the sale and in the presence of the defendant, of the latter's name in the memorandum of sale as the purchaser is a sufficient execution of the contract to bind him as the party to be charged thereby.[58] When, at an auction sale under a deed of trust, the trustee acts as his own auctioneer, he cannot bind the purchaser by a memorandum of the sale made by himself, so as to hold him liable within the meaning of the statute. Although acting as auctioneer, he is a party to the sale, with natural interest and bias adverse to the purchaser; and the circumstances that he has no beneficial interest in the subject of the sale settles nothing as to his bias.[59] A written advertisement or notice of a trustee's sale, signed by the trustee, is not a sufficient note or memorandum within the statute of frauds.[60] A memorandum of a contract for the sale and conveyance of land, although signed only by the party to be charged, when sufficiently clear and certain in its terms, affords a competent bias for a suit for specific performance.[61] A memorandum of sale of real estate, which consists of two papers, must contain such a reference from one to the other as will serve to connect the two, and such as will conduct the searcher from one to the other with reasonable certainty.[62] A proposition in writing, accepted by the other party, to sell "all that piece of property known as the Union Hotel property," held not to be a sufficient description of the property to take the case out of the statute of frauds, it being uncertain what property was comprehended in the words "Union Hotel property" without resorting to parol evidence.[63] So, a memorandum which describes the land sold as a "lot of 18th St., 60x180 ft., about 300 ft. S. of Herbert St.," is not sufficient.[64]

12. *Signature of Party Bound.*—The statute is not strictly construed respecting the signature of the party to be charged. Anything done indicating a clear intention to sign is usually held sufficient. A mark of a party has usually been held sufficient,[65] as well as an initial,[66] or even a fictitious name.[67] Although the name is printed or stamped,[68] or written in pencil, it will satisfy the stat-

[52] O'Neil v. Crain, 67 Mo. 250, 251, 252.
[53] Lash v. Parlin, 78 Mo. 391, 397.
[54] Rollins v. Claybrook, 22 Mo. 405; Moss v. Green, 41 Mo. 389; Briggs v. Munchon, 56 Mo. 467; Leibke v. Methudy, 14 Mo. App. 65; Parks v. People's Bank, 31 Mo. App. 12, 18.
[55] See Williams v. Morris, 95 U. S. 441.
[56] Armsby Co. v. Eckerly, 42 Mo. App. 299.
[57] Greeley-Burnham Gro. Co. v. Capen, 23 Mo. App. 301.
[58] Springer v. Kleinsorge, 83 Mo. 152.
[59] Tull v. David, 45 Mo. 444.
[60] White v. Watkins, 23 Mo. 423.
[61] Mastin v. Grimes, 88 Mo. 478.
[62] Per Thompson, J., in Boeckeler v. McGowan, 12 Mo. App. 507; Schroeder v. Taaffe, 11 Mo. 267; Wiley v. Roberts, 27 Mo. 388; Briggs v. Munchon, 56 Mo. 467; Christensen v. Wooley, 41 Mo. App. 53.
[63] King v. Wood, 7 Mo. 390.
[64] Schroeder v. Taaffe, 11 Mo. App. 267.
[65] Tagiasco v. Molinau, 9 La. (O. S.) 512; Hubert v. Moreau, 12 Moore C. P. 216; Brown v. Butchers' Bank, 6 Hill, 443.
[66] Palmer v. Stephens, 1 Denio, 478; Sanborn, v. Flagler, 6 Allen, 474;
[67] Angur v. Conture, 68 Me. 427.
[68] Brayley v. Kelley, 25 Minn. 160; Brown on the Statute of Frauds, § 356.

ute.[69] If the memorandum is to be *signed* only, a signature in any part will answer; but if it is to be *subscribed*, it must appear at the bottom of the memorandum.[70]

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[69] Merritt v. Clason, 12 Johns, 102; Draper v. Pattina, 2 Speers, 292; Clason v. Bartley, 14 Johns, 484.
[70] Tiedeman on Sales, § 77.

HUSBAND AND WIFE — DIVORCE — TENANCY IN COMMON.

STELZ V. SHRECK.

Court of Appeals of New York, October, 1891.

1. After an absolute divorce the divorced husband and wife are tenants in common of an estate held by them before their divorce as tenants by the entirety.

2. W. S. and M. S., husband and wife, hold an estate by the entirety; they are absolutely divorced for the adultery of the wife, and both marry again. W. S., the husband, dies, and his widow claims dower in his estate, while his former wife claims the whole estate as survivor. It is held that the widow has dower in one-half the estate, as at the time of his death the husband held the estate as tenant in common with his divorced wife.

PECKHAM, J.: We agree in this case with the views expressed by the learned judges who delivered the opinions at the special and general terms of the supreme court. The sole question arises out of the decree of divorce which the husband obtained from his first wife on account of her adultery.

Did that divorce have any, and if so, what, effect upon the character of the holding of the real property by the former husband and wife? By the conveyance the husband and wife took an estate as tenants by the entirety (Bertles v. Nunan, 92 N. Y. 152; Zorntlein v. Bram, 100 N. Y. 13). Such a tenancy differs from all others. In one respect it is like a joint tenancy, in that there is a right of survivorship attached to both, but it is not a joint tenancy in substance or form (Barber v. Harris, 15 Wend. 615; Jackson v. McConnell, 19 *Id.* 175; Bertles v. Nunan, *supra*). It originated in the marital relation, and although the survivorship presents the greatest formal resemblance to joint tenancy, instead of founding the estate by the entirety upon the notion of joint tenancy, all the authorities refer it to the established effect of a conveyance to husband and wife pretty much independent of any principles which govern other cases. Jackson v. McConnell, *supra*.

At common law, husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. These two real individuals, by reason of this relationship, took the whole of the estate between them, and each was seized of the whole and not of any undivided portion. They were thus seized of the whole, because they were legally but one person. Death separated them, and the survivor still held the whole, because he or she had always been seized of the whole, and the person who died had no estate which was descendible or devisable. Being founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife, when that unity is broken, not by death, but by a divorce *a vinculo*, it stands to reason that such termination of the marriage tie must have some effect upon an estate which requires the marriage relation to support its creation. The claim on the part of the counsel for the wife is that it is only necessary the parties should stand in the relation of husband and wife at the time of the conveyance, and at that time the estate vests, and no subsequent divorce can affect an estate which is already vested. But the very question is, what is the character of the estate which became vested by the conveyance? If it were of such kind that nothing but the termination of the marriage by the death of one of the parties could affect the estate conveyed, then, of course, the claim of the counsel is made out; but it is an assumption of the whole case to say that the estate vested was of the character he claims. When the idea upon which the creation of an estate by the entirety depends is considered, it seems to me much the more logical as well as plausible view to say that, as the estate is built upon the unity of husband and wife, it never would exist in the first place but for such unity, anything that terminates the legal fiction of the unity of two separate persons ought to have an effect upon the estate whose creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend upon the continued legal unity of the two persons to whom the conveyance was actually made. The survivor takes the whole in case of death, because that event has terminated the marriage and the consequent unity of person. An absolute divorce terminates the marriage and unity of person just as completely as does death itself, only instead of one, as in case of death, there are in the case of divorce two survivors of the marriage, and there are, from the time of such divorce, two living persons in whom the title still remains. It seems to me the logical and natural outcome from such a state of facts is that the tenancy by the entirety is severed, and a severance having taken place each takes his or her proportionate share of the property as a tenant in common, without survivorship. It is said that in such case it ought to be a joint tenancy, but I see no reason for that claim. As it has been held that seizin by the entirety does not create a joint tenancy either in substance or form (19 Wend. *supra*), and as a tenancy by the entirety depended wholly upon the marital relationship, there can be no reason why the seizin should be turned into a joint tenancy by virtue of the very fact which terminated the unity of person upon which the right of survivorship is itself founded, and to which it owed its continued existence.

It is true that a conveyance of this kind, if made to two persons who were not husband and wife, would at common law have created a joint tenancy. But our statute provides that every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy (1 R. S. 727, sec. 44). This statute did not reach an estate by the entirety, nor did the statutes of 1848 and 1849 and 1860 and 1862. Bertles v. Nunan, *supra*. It, therefore, still exists under our law.

We have seen, however, that a tenancy by the entirety is not a joint tenancy in form or substance. Upon what principle should the termination of the former species of tenancy, resulting from an absolute divorce, be changed into the latter in the face of our statute relating to joint tenancies? The conveyance did not expressly declare that the tenancy was to be a joint tenancy, and therefore when the original character of the tenancy by the entirety is changed, it cannot be transformed into that of a joint tenancy without a clear violation of our statute.

The counsel for the defendant urges that we are giving, by this decision, a retroactive effect to a decree of divorce in a case not warranted by the statute and in violation of the well settled rule in this State as to the effect of such a decree. He says that we change the effect of the deed of conveyance, and that the decree of divorce not only severs the unity of person from the time of its entry, but that we allow it to date back to the date of the conveyance, and to give an effect to such conveyance that it did not have at the time of its execution. We think not.

We do not at all question the contention of the defendant's counsel that a decree of divorce in this State only operates for the future and has no retroactive effect or any other effect than that given by statute. But we hold that the character of the estate conveyed was such in its creation that it depended for its own continuance upon the continuance of the marital relation, and when that relation is severed, as well by absolute divorce as by death, the condition necessary to support the continuance of the original estate has ceased, and the character of the estate has for that reason changed. The estate does not revest in the grantor or his heirs, for no such condition can be found in the law or in the nature of the estate, and it must, therefore, remain in the grantees, but by an altered tenure. Their holding is now a holding of two separate persons, and for the reasons already given such holding should be by tenancy in common, and, of course, without any survivorship.

I think the contention that the first wife is entitled to the whole of the estate as survivor of her husband cannot be maintained. Although the question is new in this State, it has been somewhat debated in the courts of some of the other States. In Harrer v. Wallner (80 Ill. 197), and Lash v. Lash (58 Ind. 526), and Ames v. Norman (4 Sneed, 683), similar views to those w have herein stated are set forth. A contrary decision has been made in Michigan, in the case of Lewis, reported in 48 Northwestern Reporter at 680. We have read the opinion in that case, but we feel that our own view is more in accord with legal principles, and we cannot, therefore, follow it.

Upon the defendant's appeal the judgment ought to be affirmed.

Upon the appeal of the plaintiff, her counsel contends that there is a condition annexed to the estate by the entirety which is implied by law, and the condition is that each of the grantees shall remain faithful to the obligations of the married state, and shall not, by his or her misconduct, cause a dissolution of the marriage relation upon which the estate depends. I find no warrant for implying any such condition in the character of the holding, and still less for the result which, as he claims, flows from a violation of such condition. Its violation (judicially determined) results, according to the plaintiff's argument, in the immediate vesting of the whole estate in the innocent party to the marriage, just the same as if the other party thereto were actually dead instead of divorced. None of the authorities treats the estate as dependent upon any such condition, and, however proper it might be to enact by legislative authority a condition of that nature, this court has not that power.

It is unnecessary to add anything further to the views which have been expressed by the learned judges of the supreme court in this case, and we are of the opinion that the judgment appealed from should be affirmed, and as neither party appealing has succeeded here, the affirmance should be on both appeals, without costs.

All concur, except Earl, J., dissenting and Finch, J., absent.

NOTE.—The point decided in the principal case is a narrow one, although many questions have arisen on estates by entireties, the cases upon which are collected in 18 Cent. L. J. 183; 10 Am. St. Rep. 99, note, and 24 Abb. N. Cas. 229, notes. This case was decided in the same way in the court below, and is reported in 10 N. Y. Supp. 790, 25 Abb. N. Cas. 133.

The question now presented has received consideration from text-writers (Stew. on Mar. & Div. 441; 2 Bish. Mar. & Div. 716; Freeman on Coten. &. Part. 76), and it is stated by them that the effect of an absolute divorce on an estate in entirety is to convert that estate into one of tenancy in common. These judicious writers seem to base their statement of the law on this subject largely on what was decided in Ames v. Norman, 4 Sneed, 696. In that case the court says: "If the rights of husband and wife in relation to an estate held by entireties are not altered by the decree declaring the divorce, what becomes of the joint estate? What are their respective rights in the future in regard to it? They are no longer one legal person; the law itself has made them twain. They are no longer capable of holding by entireties; the relation upon which that tenancy depended has been destroyed; the one legal person has been resolved by judgment of law into two distinct individual persons, having in the future no relation to each other, and

with this change of their relations must necessarily follow a corresponding change of the tenancy dependent upon the previous relations. As they cannot longer hold by a joint seisin, they must hold by moieties. The law, by destroying the unity of person between them, has by necessary consequence destroyed the unity of seisin in respect to their joint estate, for, independent of their matrimonial union, this tenancy cannot exist."

In Lash v. Lash, 58 Ind. 528, it is said: "Tenancy by entireties originated in the marital relation, founded on the idea of the unity of husband and wife, rendering them but one person in law. The continuance of such tenancy in a given case depended upon the continuance of the marital unity. The dissolution of that unity before death, whereby two actual persons were restored to their natural severalty, operated to divide the title to the estate held by them while husband and wife by entireties, equally between them, making them tenants in common thereof. When there was nothing in the deed of conveyance controlling the matter, the effect of the divorce was to simultaneously destroy the tenancy by entireties." To the same effect also is Harrer v. Wallner, 80 Ill. 197.

Other cases which may throw some light on this side of the subject are Boggs v. Boggs, 55 Ga. 590, 591; Benson v. Benson, 16 Bank. Reg. 377; Depas v. Mayo, 11 Mo. 314; Gillespie v. Warford, 2 Cold. 632, 642.

The only contrary decision is found in Appeal of Lewis (Mich.), 48 N. W. Rep. 580, in which case the court seem to have been influenced by sentiment rather than by principle and authority. The court says: "It is contended by the learned counsel for the appellee that the entirety of seisin of husband and wife in real estate, with the incident right of survivorship, cannot exist independent of the legal condition of unity of person on which it rests, and that a decree of divorce, which destroys the unity of person, destroys also the entirety of seizin; that the right of survivorship is destroyed by the decree, and that the parties then became tenants in common, seized in severalty of their respective moieties. We are cited in support of this doctrine to the following authorities: Freeman on Coten. 76; 2 Bish. Mar. & Div. (5th ed.) 716; Ames v. Norman, 4 Sneed, 695; Harrer v. Wallner, 80 Ill. 197; Lash v. Lash, 58 Ind. 526; Baker v. Stewart, 40 Kan. 442, 19 Pac. Rep. 904. Freeman and Bishop cite, as supporting their text, the case of Ames v. Norman. Under these authorities it is far from being well settled that a divorce destroys the right of survivorship. It is said in 2 Bish. Mar. & Div. 716: 'Property settled upon the husband and wife, or held by third persons for the benefit of either, remains usually after the divorce the same as before.' Also in 1 Washb. Real Prop. 425: 'If there be a divorce of the wife from the husband, she is restored to a moiety of the estate during the lives of the two, with the right of survivorship on his death.' In Babcock v. Smith, 22 Pick. 61, the husband and wife conveyed her real estate to a trustee in trust for them both. The wife obtained a divorce by the misconduct of her husband, but the court held that the divorce did not change their relative rights in the land under the contract. We see no reason in holding that a husband or wife can, by violation of the marital obligations, obtain an interest in land which she or he does not possess while fulfilling such obligations. The common law should not, and in our judgment does not permit a person to thus profit by his own gross wrong, and a violation of the most sacred obligation."

DAVID STEWART.

CORRESPONDENCE.

INSTRUCTION AT THE NEW YORK LAW SCHOOL

To the Editor of the Harvard Law Review:

My attention has been called to an article in the last number of your *Law Review* in which you compare the Columbia College Law School, under its new administration, with the New York Law School, and express your preference for the methods of the former. Your article contains several important errors of statement, which have apparently colored your judgment and will convey entirely wrong impressions to your readers in regard to to the New York Law School.

1. Your article says that the law library in the Equitable building which our students have the privilege of using, comprises about 13,000 volumes and is "a library a little more than half the size of the Columbia law library." The truth is that the Equitable library is more complete than the Columbia law library. The Equitable library has complete sets of all the English, Scotch, Irish, Canadian and American reports, the volumes of English statutes, the general statutes and codes of all our States, a full series of the Session Laws of all the States since the year 1839, English and American general digests as well as digests of the various States, a large and well selected collection of text-books, a large collection of leading cases upon various topics, other general works of reference, all the leading current law periodicals, etc. The Columbia law library has not yet obtained complete sets of the American reports, and its collection of Session Laws is very meagre. Its collection of general statutes of the different States is also notably deficient. The Columbia library may easily be swollen to double the size of the Equitable library, by including in it works of general literature, political science, etc., but as I understand your article, the comparison was limited to the "Columbia law library."

2. The "Dwight method" of legal instruction, which the New York Law school has adopted, "is little more" says your article, "than the discarded Harvard method as pursued by Professors Parsons, Washburn and others." "A prophet is not without honor, save in his own country"; and if we are obliged to admit that we have honored these distinguished men by adopting their treatises as our text-books for instruction, it seems inevitable that we too should be without honor in their own country." But "the very head and front of our offending hath this extent, no more." I am informed by lawyers now practicing in this city, who studied at Harvard under Professor Parsons and his associate professors that their method was almost wholly a lecture system. The "Dwight method," on the contrary, is a recitation system, accompanied by abundant oral exposition by the instructors and by the reading of illustrative cases by the student. The recitation system is pursued at our American colleges and universities, with scarcely an exception, in teaching the various branches of learning that enter into a college curriculum, and it is difficult to comprehend why it should be less suited to legal instruction than to these various subjects. The danger of this method is, of course, that the mind of the student may simply, like a sponge, absorb the contents of a book and then have them squeezed out again, without deriving much benefit from the process. But the "Dwight method" effectually guards against this danger, for its aim is not simply that a student shall remember, but that he shall understand and assimilate. He studies the text-book carefully that he may learn and comprehend what he can by his own efforts and also be enabled to

understand the oral exposition in the class-room, and gain from it the largest measure of benefit. He is called upon to recite, not that he may repeat parrot-like the words of the book, but that he may show and develop his capacity to state in his own language the knowledge he has acquired. He is encouraged to ask questions, in order that his own individual needs may be met. And the professor's constant endeavor is, by teaching the law as a system of principles, by unfolding the reasons upon which these principles depend, by simplifying abstruse statements of doctrine, by illustrations drawn from the reports and from practical life, to give vitality and interest to the whole course of instruction, and to adapt it to the student's comprehension. This we believe to be far superior to any mere lecture system.

3 The article says further that text-books are "used entirely, with occasional references to cases by way of illustration." Such references are not "occasional" merely, but are given constantly, day by day, and students whose advancement in legal knowledge is sufficient to enable them to read the cases to advantage, are encouraged to do so. The instruction is kept abreast of the latest developments of the law, and the most recent cases of value, as well as those earlier ones which are treasured as great land-marks in legal history, are constantly brought to the student's attention. The great difficulty is, however, that in the case of a law school containing hundreds of students, no law library can be large enough to enable all the members of a class to read the same cases on the same day. To avoid this difficulty, I have for some time been engaged, with my associates, in preparing a collection of leading cases upon the various legal topics of chief importance. These volumes will be placed in the hands of our students, to be read in connection with the text-books. This will show how high a value we place upon the reading of cases for the purpose of illustration. We agree with Lord Mansfield, however, that "the law does not consist of particular cases, but of general principles which are illustrated and explained by those cases."

4. You stated in the article referred to that our students are "distinctively encouraged" to enter lawyers' offices. Our actual practice is this: we strongly urge upon members of the junior class not to enter law offices, but to devote their whole time to the law school work; for the members of the senior class, however, who have done faithful work in their prior legal study, we think the experience and training received in a good office is a benefit rather than an injury. By a "good office" I mean one which does not fritter away a student's time by employment on unimportant details, but which gives him access to a good library, contact with honorable lawyers, an opportunity to learn the practical conduct of legal business, familiarity with the preparation of briefs, pleadings, etc. We try to advise every man, in this respect, for his own best good. And yet we do not forbid any student, senior or junior, from entering an office, if he so chooses. The tendency of the times is to extend the elective system of studies, even to undergraduates in colleges, and so treat them as competent to choose for themselves. In like manner, we regard our students, many of whom are college graduates, as entirely competent to judge for themselves, in regard to this question of entering offices.

5. Lastly, your article says of this law school that "the theory, history and science of the law are disregarded, as being rather food for the jurist than for the practical lawyer." This charge is so sweeping that I believe it will carry its own refutation with it to every reflecting mind. As truly might you have said that we teach no law at all. And, furthermore, if it be your conception that to be a jurist one cannot also be a practical lawyer, I cannot share in this opinion. Certainly the greatest jurists this country has known have been practical lawyers as well. If I can only be of some real service in training practical lawyers, such as they have been, I shall be well content.

It is natural that your sympathies should be with the Columbia school, under its new administration, rather than with us. But still I venture to believe that it has not been your purpose to do us knowingly an injustice. I have been not a little surprised, I must confess, that some advocates of the "Harvard method" have pursued the course they have, in order to extend its range and promote its progress. What would have been the Harvard opinion, I wonder, if a former Columbia professor, who pursued the Dwight method, had been called to Harvard to teach by the Harvard method, and when fairly seated in his new chair, had reverted to his old system? Suppose further, he had been praised by a Columbia professor for his success in doing the work of Columbia at Harvard, how would this have affected opinion at Cambridge? Possibly this mode of extending Columbia methods might not have won unqualified praise. But I have met leading advocates of the Harvard method—some of whom are teachers by it—and I feel assured that its true exponents are lovers of truth and fairness, honest seekers after facts, and when facts are known will give them their true weight. And such I believe will be your judgment upon the facts which I have in this letter set forth before you and your readers.

GEORGE CHASE,
Dean of the New York Law School.

New York, Nov. 11, 1891.

BOOK REVIEWS.

THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS.

We have found much pleasure, and, we dare say, considerable profit, in the study of this work, which gives us in concise and clear language the salient features of ancient Hebraic criminal law. To many the Talmud, which comprises the teachings of the ancient Hebrew sages, is "as a sealed book," and it is the aim of the author of the present work to acquaint such with an important part of its contents—its system of criminal jurisprudence. The reader will perhaps be surprised, to find his preconceived notions of Hebrew law and justice entirely erroneous. The Christian world has stigmatized the Talmudic system as "cruel, vindictive, and sanguinary," largely because of its cruelty as exposed in the alleged trial of Jesus, and the belief is general among those who have not made special study that the criminal laws of the ancient Hebrews were something frightful in point of severity. But after a study of the present work one will necessarily conclude with Deutsch, who said in the *London Quarterly Review* that "it would not be easy to find a more humane, almost refined penal legislation, from the days of the old world to our own than that of the ancient Hebrews." It will be seen that their system of criminal jurisprudence was one which enforced civil order and secured the safety and peace of society by mildness and consideration, tempering justice with a love of humanity, and all this in an age of savagery and violence, of wars and uncertainty. And we quite agree with the commentator that even though the judiciary

system of the ancient Hebrews, preserved in the Talmud and other Rabinnic writings, be not acknowledged the exemplar of polity among modern governments or as the universal fountain for general legislation, it certainly deserves better treatment at the hands of the critic than the generality of even modern writers are willing to accord to it.

The student is impressed also with the clemency prevading the ancient Hebrew code manifested in the rules by which the judges were to direct all proceedings against the accused, and which required proof of guilt by at least two trustworthy witnesses. The anxious desire of the Hebrew ages to save life and limb invented an additional rule which certainly precluded every possibility of conviction of crime which, through ignorance of law, men are liable to commit. That rule was the antecedent warning which, in order to bring legal conviction, in any case, must be administered immediately before the commission of the misdeed. This requirement has no equal in ancient or modern law. By the laws of the modern civilized world only ignorance or mistake of fact excuses the crime, but not error in point of law, while Talmudic jurisprudence allows conviction only when the criminal is not ignorant of even the slightest point of law, and knowing the law and being forewarned of the necessary consequences of his intended violation still sins with a high hand, thus clearly manifesting his presumptuousness or legal prepense.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCORD AND SATISFACTION—Trespass.—Refuse from two coal mines, several miles apart, was thrown into a stream without any concert of action on the part of the mine-owners, and it accumulated so as to cause the overflow of plaintiff's land, and the deposit thereon of coal-dust, etc.: *Held*, that although it was difficult to apportion each mine-owner's contribution to the damage, plaintiff's release, for a valuable consideration, to one of all claim for damages done or to be sustained by his pollution of the stream was not an accord and satisfaction for the whole damage, or a bar to a recovery from the other.—*Gallagher v. Kemmerer*, Penn., 22 Atl. Rep. 970.

2. ADMINISTRATION— Claims Against Decedent's Estate.—Upon examination of the papers on which application was made to a probate court, in the matter of the estate of a deceased person, that said court receive, hear, and allow a claim against the deceased several months after the expiration of the period of time duly fixed for the presentation of such claims, it is *held* that the court did not err in its order dismissing the application and rejecting the claim on the ground that good cause had not been shown, and that no sufficient excuse had been given for the failure to present the claim within the prescribed period of time.—*St. Croix Boom Corp. v. Mower's Ex'rs*, Minn., 50 N. W. Rep. 197.

3. ADMINISTRATION—Right to Partnership Property.—The administratrix of the estate of a deceased member of a copartnership consisting of two persons has no legal right to take the possession of the property of the partnership from the surviving partner until such surviving partner has been cited for that purpose, and neglects or refuses to give the bond required by paragraph 2819, Gen. St. 1889, and until the administratrix of the undivided estate of the deceased partner has given the further bond required by paragraph 2820, *Id.*—*Teney v. Laing*, Kan., 27 Pac. Rep. 976.

4. APPEAL—Record.—In the absence of a showing by the abstract on appeal that all the evidence is brought up which was before the trial court when it overruled a motion to retax the costs, it will be presumed that the motion was properly overruled.—*McNider v. Sirrine*, Iowa, 50 N. W. Rep. 200.

5. APPEAL—Res Adjudicata. — After conviction has been affirmed by the supreme court, questions as to the sufficiency of the indictment and the jurisdiction of the trial court are *res adjudicata*, and cannot be considered on appeal from an order dismissing a writ of *habeas corpus*, issued before the trial of the indictment.—*Smith v. Foster*, Iowa, 50 N. W. Rep. 220.

6. ASSUMPSIT — Sufficiency of Evidence.—Where defendant guarantied the payment of a certain amount of P's indebtedness to plaintiffs, providing he owed that amount to P at a certain time, in an action against defendant it was incumbent on plaintiffs to show that defendant was so indebted to P at that time.—*Gillett v McAllister*, Colo., 27 Pac Rep. 1013.

7. ATTACHMENT — Failure to Pay on Delivery.—To sustain an attachment under Civil Code Colo. § 92, subd. 10, which provides that attachment may issue on an affidavit alleging "that the defendant has failed or refused to pay the price or value of any article or thing delivered to him which he should have paid for upon the delivery thereof" where defendant makes a general denial, plaintiff must show an unconditional contract to pay on the delivery of each article, and a demand for such payment.—*Miller v. Godfrey*, Colo., 27 Pac. Rep. 1016.

8. BASTARDY — Evidence—Compromise.—An offer of compromise, made by a defendant in a bastardy proceeding, not accepted, is not admissible in evidence. The rule does not exclude the admission of particular facts tending to show guilt.—*Olson v. Peterson*, Neb., 50 N. W. Rep. 154.

9. BOUNDARIES.—The fact that a purchaser of land, holding and claiming ownership thereof, has not yet paid the consideration therfor, does not invalidate a parol agreement made by him with an adjoinining land owner fixing the boundaries between their land.—*Cavanaugh v. Jackson*, Cal., 27 Pac. Rep. 931.

10. CARRIERS—Depot Grounds.—A railway company owning the grounds surrounding its depot has a right to adopt and enforce regulations assigning stands for each bus and hack driver while waiting for trains, and, where plaintiff resisted such regulation, the station master is not guilty of assault and battery in taking hold of him and ejecting him from the stand assigned to another.—*Cole v. Rowen*, Mich., 50 N. W. Rep. 138.

11. CARRIERS—Live Stock Shipments.—Where a railroad company under a special contract, furnishes an entire car, in which stock may be fed and watered, to a shipper, who loads it with "emigrant movables" and several horses, the contract requiring that he load the car and accompany it, and feed, water, and care for the stock at his own risk and expense, and exempting the

company from liability for delays, and there is no agreement as to any layout along the route, the shipper does not, in the absence of a custom to that effect, acquire by such contract the right to have the car stopped and laid out so that he may rest his horses, and thus save them from suffering and death, but can only secure such delay by abandoning the contract, or by contracting anew for the use of the car for a longer time.—*Illinois Cent. R. Co. v. Peterson*, Miss., 10 South. Rep. 43.

12. CERTIORARI — Eminent Domain.—On *certiorari* to review an order appointing commissioners for the condemnation of land under the general railroad law, if it appear that a *bona fide* reasonable effort to purchase has not been unsuccessfully made by the petitioning company, although the owner was accessible and competent to sell, the order will be set aside.—*Chambers v. Carteret & S. R. R. Co.*, N. J., 22 Atl. Rep. 995.

13. CHATTEL MORTGAGE— Failure to Refile.—A mortgagee of personal property, who permits his mortgage to become inoperative as notice to subsequent purchasers for want of refiling, and allows the property to remain in the possession of the mortgagor, who sells it to a *bona fide* purchaser without notice, waives his right to a strict legal forfeiture, and cannot recover such property from the purchaser.—*W. W. Kimball Co. v. Huntington*, Wis., 50 N. W. Rep. 177.

14. CONDITIONAL SALE— Rights of Vendor. — In an action to try the title to a soda fountain, it appeared that the fountain was sold and transferred to a drug company; that an agreement was made and properly recorded that the title should remain in the vendor until the fountain was paid for; that one of the vendees bought out his partner, and gave a chattel mortgage on the stock and fountain, which provided that he might sell the stock without accounting for the proceeds; that the mortgage was assigned, and on maturity the assignee attempted to foreclose, and sold the fountain: *Held*, that the mortgage was void as to the original vendor, and that the last purchaser took no title as against him.—*Harbison v. Tufts*, Colo., 27 Pac. Rep. 1014.

15. CONSTITUTIONAL LAW—Mining Lease.—The law, as declared by a decision of the supreme court, when such decision is not a construction of a statute, does not enter into contracts made thereafter, and the subsequent reversal of the decision does not therefore impair the obligation of contracts in contravention of Const. U. S. art. 1, § 10.—*Springer v. Citizens' Natural Gas Co.*, Penn , 22 Atl., Rep. 986.

16. CONSTITUTIONAL LAW—Special Acts.—The act of 1876, for the construction, etc., of water works for the purpose of supplying cities, towns, and villages with water, applies only to municipalities having not more than 15,000, and not less than 500 inhabitants: *Held*, that for the purpose of this legislation, this classification by population is sufficient to meet the constitutional requirement of generality.—*State v. Moore*, N. J., 22 Atl. Rep. 993.

17. CONTRACTS BY MARRIED WOMEN. — Under Civil Code Cal. § 093, providing that no estate in the land of a married woman shall pass except by a grant or instrument acknowledged by her, and section 1187, providing that a conveyance by a married woman has no validity until acknowledged, an unacknowledged contract by a married woman for the sale of her land is void, and cannot be enforced by her, and is not one which she can avoid or not, at her option.—*Banbury v. Arnold*, Cal., 27 Pac. Rep. 934.

18. CONTRACT— Parol Evidence.—A written contract cannot be varied, qualified, or contradicted by parol evidence of a prior or contemporaneous agreement between the parties.—*Kaserman v. Fries*, Neb., 50 N. W. Rep. 69.

19. CONTRACT—Reward Offered by City.—A mayor of a city officially promised a reward for the apprehension of a fugitive municipal officer, and on account of the absence of any authority in the mayor to bind the city there was no principal to respond: *Held*, that by reason of this excess of his authority the mayor became personally liable for the performance of the contract.—*Tinken v. Tallmadge*, N. J., 22 Atl. Rep. 966.

20. COUNTIES— Corporate Existence — Collateral Attack.—Where a public organization of a corporate or *quasi* corporate character has an existence in fact, and is acting under color of law, and its existence is not questioned by the State, its existence cannot be collaterally drawn in question by private parties.—*In re Short*, Kan., 27 Pac. Rep. 1005.

21. COUNTY ATTORNEY—Assistant.—Under the proviso clause of section 20, ch. 7, Comp. St., a county attorney, when the public interests demand, may, under the direction of the district court, procure, at the expense of the county, an attorney to assist him in the trial of a person charged with a felony.—*Fuller v. Madison County*, Neb., 50 N. W. Rep. 255.

22. CONENANT—Breach— Damages.—Where there are two covenantees, the administrator of one of them cannot sue for breach of the covenant, without showing in his declaration that the other covenantee is dead. —*Waln v. Cuthbert*, N. J., 22 Atl. Rep. 1007.

23. CRIMINAL EVIDENCE — Homicide.—In a murder case, where the killing was admitted, and only the circumstances were in dispute, and the evidence showed that defendant was a comparative stranger to deceased and his affairs, without hatred or ill will towards him, the State may, for the purpose of showing motive, prove that a third person entertained hatred for deceased, and desired to get rid of him, and that he sent defendant to do the killing.—*Story v. State*, Miss., 10 South. Rep. 47.

24. CRIMINAL LAW—Assault with Intent to Kill.—On indictment for assault with intent to commit murder, when the evidence shows that the wound was inflicted on the knee, there is no presumption that defendant aimed at the limbs, such as will reduce the offense to assault with intent to commit great bodily injury.—*State v. Postal*, Iowa, 50 N. W. Rep. 207.

25. CRIMINAL LAW—False Pretenses.—One who obtains money by false pretenses is liable to punishment, though the person from whom it was obtained parted with it in furtherance of an illegal purpose to obtain by fraud valuable land from the United States.—*Cummins v. People*, Colo., 27 Pac. Rep. 887.

26. CRIMINAL LAW—Giving False Pedigree.—*Held*, upon the facts that defendant could not be convicted under Pub. Laws Mich. 1887, p. 8, § 1, making it unlawful for any person to "knowingly" gives a false pedigree of any animal with intent to defraud.—*People v. Umlauf*, Mich., 50 N. W. Rep. 251.

27. CRIMINAL LAW—Robbery—Stealing.—*Held*, that the charge of robbery includes the offense of stealing from the person without force and violence or putting in fear, and that under an information for robbery the accused may be convicted of stealing from the person.—*Brown v. State*, Neb., 50 N. W. Rep. 154.

28. CRIMINAL LAW—Second Appeal—Res Judicata.—Where a judgment and sentence in excess of the statutory limitation has been modified on a writ of error, charging such excess, the reformed judgment is *res judicata* of all questions arising on the record previous to the judgment and sentence.—*McDonald v. State*, Wis., 50 N. W. Rep. 185.

29. CRIMINAL LAW—Theft of Dog.—A dog may become the subject of theft, and that, where he is shown to be worth at least $20, such theft is a felony.—*Hurley v. State*, Tex., 17 S. W. Rep. 455.

30. CRIMINAL PRACTICE — Appeal Bond — Sureties.—Where the sureties in a bond, given under Rev. St. Wis. § 4714, on appeal to the circuit court from a conviction for the violation of the excise laws, undertake that the principal shall appear before such court at the term thereof "then next to be held, to answer to said case, and to abide the judgment of the circuit court," their liability in respect of the judgment is limited to such judgment as may be rendered at that term, so that it ceases when that term is adjourned without any

proceedings in the case.—*State v. Becker*, Wis., 50 N. W. Rep. 178.

31. CRIMINAL PRACTICE — Forgery. — It is proper to charge, in separate and distinct counts of the same information, the forgery of a promissory note, and the selling, exchanging, or uttering of it as genuine.—*State v. Zimmerman*, Kan., 27 Pac. Rep. 999.

32. CRIMINAL PRACTICE — Summoning Jurors.—The time of summoning jurors is immaterial, so far as it affects their official acts.—*Roberts v. State*, Tex., 17 S. W. Rep. 450.

33. DECEIT—Right to Recoup.—In an action for deceit in procuring plaintiff to enter into a contract to do certain work, defendant may recoup for damages growing out of plaintiff's breach of such contract.—*Davidson v. Wheeler*, R. I., 22 Atl. Rep. 1022.

34. DEED — Estate Conveyed.—A deed conveyed an estate "for and during his, the said S's natural life, and his oldest male heir at the time of the said S's decease then living, and his heirs and assigns forever." The *habendum* was: "To him, the said S, for and during his natural life, and to his said oldest male heir and assigns forever." *Held*, that S took a life-estate, with remainder in fee-simple to his oldest male heir living at his decease.—*Smith v. Collins*, R. I., 22 Atl. Rep. 1018.

35. DEED—Fraud—Undue Influence.—Conveyances by an aged parent to a child, in consideration of the agreement by the latter to support and provide for the former, are upheld if the transaction appears to have been free from fraud, and the evidence does not show that confidence has been reposed by the infirm in the stronger, but does show that the parties dealt at arms length.—*Mott v. Mott*, N. J., 22 Atl. Rep. 997.

36. DEPOSITION—Necessity of Seal.—Under Code Colo. 1887, § 349, providing that the deposition of a witness residing out of the State must be taken on a commission issued by the clerk under the seal of the court, a commission issued without a seal by the judge of the county court acting as his own clerk is a nullity, and the deposition taken under it is inadmissible.—*Blakelee v. Dye*, Colo., 27 Pac. Rep. 881.

37. DESCENT — Unborn Child Omitted from Will. — A testator, when he made his will, had a child living with him. His wife was also living with him, and was seven months gone with child. Without expressly excluding the living child by name, or mentioning any fact that tended to show that the unborn child was excluded, the testator made his wife the sole beneficiary of the will. *Held*, that this was an exclusion of the unborn child.—*Leonard v. Enochs*, Ky., 17 S. W. Rep. 437.

38. DISCOVERY IN ACTION AT LAW—Removed Cause.—Upon removal of an action at law from an Iowa to a United States court, defendant cannot be compelled to file answers to interrogatories attached to the petition, as allowed under the Iowa statute, since Rev. St. U. S. § 861, provides that the mode of proof in such actions shall, except under certain circumstances, be by oral testimony and examination of witnesses in open court.—*Pierce v. Union Pac. Ry. Co.*, U. S. C. C. (Iowa), 47 Fed. Rep. 709.

39. DRAINAGE—Assessment of Taxes.—Under 3 How. St. Mich. § 1740b, providing that no tax for the construction of a drain shall be spread on the tax roll till all the records required to be made by the county drain commissioner are filed with the clerk, the board of supervisors will not be compelled to assess a tax for a drain, by whomsoever laid, until the records are filed in the county clerk's office.—*Conley v. Board of Supervisors*, Mich., 50 N. W. Rep. 140.

40. DRAINAGE—Construction of Ditch.—The notice required by section 8, ch. 97, Laws 1887, to be given by the auditor, of the time set for the hearing of the petition for the construction of a ditch and of the report of the viewers thereon, is jurisdictional, and without it the board of county commissioners has no power to proceed.—*Curran v. Board of County Commissioners*, Minn., 50 N. W. Rep. 237.

41. EASEMENT—Abandonment.—Where a city has acquired, by purchase or dedication, an easement in land for the purposes of a public street or levee, mere nonuser for any length of time will not operate as an abandonment; at least until the time arrives when the street or levee is required for actual public use, and when the municipal authorities may be properly called upon to open or prepare it for such use.—*Parker v. City of St. Paul*, Minn., 50 N. W. Rep. 247.

42. EASEMENT — Ways.—A deed granting a right of way to the owner of a certain lot, "his heirs, assigns, and the tenants and occupiers thereof, at all times, forever," executed on the same day as the deed conveying the lot to him by metes and bounds, creates an easement appurtenant to such lot.—*Moel v. McCauly*, Iowa, 50 N. W. Rep. 216.

43. EMINENT DOMAIN—Compensation.—Where a railroad company constructs its road across a farm under a contested claim of title in fee, and this claim is afterwards decided against it, the measure of damages for the taking of the land is the difference between the value of the entire farm at the time the company filed its statutory bond for the payment of damages in the condition the farm was in when the company first entered upon it and its value as affected by the existence of the road.—*Graham v. Pittsburgh & L. E. R. Co.*, Penn., 22 Atl. Rep. 983.

44. EVIDENCE — Justice's Docket.—A justice docket was offered in evidence to show the date of the entry of a judgment by default. The summons was returnable on September 8th. The date of entry was indicated by the ditto sign (") in the margin, under the abbreviation "Sept.," and was followed bd "8." Over the ditto sign was written "Oct." *Held*, that the fact that judgment was entered on September 8th might be shown by the justice who made the entry.—*Damm v. Gow*, Mich., 50 N. W. Rep. 140.

45. EXECUTION.—The sheriff's return upon execution is conclusive upon the parties in the same action, and those in privity with them; but in other actions it is only *prima facie* evidence, and may be contradicted or explained.—*Stewart v. Duncan*, Minn., 50 N. W. Rep. 227.

46. EXECUTORS—Recovery of Assets.—Defendant who was sued to recover assets and money due from him to his father's estate. The evidence showed that the father and mother had deeded land to him for $6,000, and that about a year thereafter he had executed a deed of trust to secure a note for $6,000 to a third party on other land, and there was no evidence connecting the two transactions: *Held*, insufficient to support a verdict against defendant.—*McCartney v. Finnell*, Mo., 17 S. W. Rep. 446.

47. FEDERAL COURTS — Jurisdiction—Citizenship.—In an action by an alien in the United States circuit court for a district of Michigan against a Missouri corporation, a false allegation that plaintiff is a citizen of Michigan will be presumed to be a mistake of the pleader, as the court would have jurisdiction in either case, and the suit will not be dismissed under Act Cong. March 3, 1875, which provides that if in any suit commenced in a circuit court it shall appear that it does not involve a dispute or controversy properly within the court's jurisdiction, or that the parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable therein, the suit shall be dismissed without further proceedings.—*Betzoldt v. American Ins. Co.*, U. S. C. C. (Mich.), 47 Fed. Rep. 705.

48. FEDERAL COURTS—Property in hands of Receiver.—When a receiver appointed by a federal court takes possession of the property of a business corporation, and thereafter the court renders a decree ascertaining the sums due each creditor who has appeared and proved his claim, and directing a sale of the property, the fact that, pending an appeal from this decree, a court of the State which created the corporation, in a suit commenced after the bill was filed in the federal court, declares the corporation dissolved, and appoints a receiver to wind up its affairs, does not divest the

federal court of jurisdiction to proceed with the execution of its decree, and effect a complete settlement of the corporation's affairs.—*Leadville Coal Co. v. McCreery*, U. S. S. C., 12 S. C. Rep. 128.

49. FORCIBLE ENTRY AND DETAINER.—In an action of forcible entry and detainer, it appeared that plaintiff was in possession under a deed from a railroad company which had received a grant of the land; but the patent was withheld pending a question as to the rights of the company. Defendant applied for the land under the homestead act, and was refused, but went on a part of the land, and built a house, and both parties were living on the land when action was commenced: *Held*, that plaintiff's color of title entitled him to his action against one having no title whatever.—*Jenkins v. Tynon*, Colo., 27 Pac. Rep. 893.

50. FORCIBLE ENTRY AND DETAINER—Exceptions.—In an action of forcible entry and detention, the statute expressly authorizes the taking of "exceptions to the opinion of the justice," and he has authority to sign the same.—*Osborn v. Shotwell*, Neb., 50 N. W. Rep. 164.

51. FRAUDS, STATUTE OF.—The owner of a house under construction agreed orally with a subcontractor that if he would not place a lien on the house he would pay him if the original contractor did not. The contractor neglected to pay him: *Held*, in an action by the subcontractor against the owner, that the agreement was void under the statute of frauds.—*Warner v. Willoughby*, Conn., 22 Atl. Rep. 1014.

52. FRAUDS, STATUTE OF — Sale of Chattels.—Where both parties in replevin claim under purchase from a third person, and there is evidence that defendant purchased by a parol contract, and had taken a part of the goods and shipped them before the sale to plaintiff, it is a question for the jury whether there was such a delivery to and acceptance by defendant as to satisfy the Wisconsin statute of frauds.—*Thielen v. Rath*, Wis., 50 N. W. Rep. 183.

53. GAME LAWS—Constitutional Law.—Gen. St. Conn. § 2546, which provides that "no person shall at any time kill any woodcock, ruffled grouse, or quail for the purpose of conveying the same beyond the limits of the State," etc., is an exercise of the police power protecting the game birds of the State, and is not unconstitutional as a regulation of interstate commerce.—*State v. Geer*, Conn., 22 Atl. Rep. 1012.

54. GARNISHMENT—Unpaid Subscriptions to Corporations.—Under Mills' Ann. St. Colo. § 489, which provides that stockholders in corporations are not required to pay on subscriptions to stock until after 20 days' personal notice or 30 days' written or printed notice, an action cannot be maintained against stockholders, as garnishees of the corporation, for unpaid subscriptions of stock, until such notice has been given and the time allowed thereby expired.—*Universal Fire Ins. Co. v. Tabor*, Colo., 27 Pac. Rep. 899.

55. GUARDIAN AND WARD—Accounting.—After the settlement of an estate and discharge of the guardian by the probate court a court of equity may compel the guardian to account for property fraudulently concealed from his ward and the court.—*Lataillade v. Orena*, Cal., 27 Pac. Rep. 924.

56. HABEAS CORPUS—Jurisdiction of Federal Courts.—Under Rev. St. U. S. § 752, which authorizes judges of the supreme court and of the district and circuit courts to grant writs of *habeas corpus*, and section 753, which provides that the writ shall not extend to a prisoner in jail, unless, among other cases, he is in custody in violation of the constitution, or of a law or treaty of the United States, such judges can on *habeas corpus* inquire into the legality of imprisonment by judgment of a State court under a State statute alleged to be in violation of the constitution and of a treaty of the United States.—*In re Wong Yung Quy*, U. S. C. C. (Cal.), 47 Fed. Rep. 717.

57. HABEAS CORPUS—When Lies. — Where the trial court acquired jurisdiction of the subject-matter of an indictment and the person of the accused, the judgment of the court on the question whether the indictment sufficiently charged the crime of perjury can only be reviewed on appeal or writ of error, and *habeas corpus* will not lie.—*Ex parte Harlan*, Okla., 27 Pac. Rep. 920.

58. HIGHWAYS—Appeal.—Gen. St. ch. 13, § 60, does not require that an "application" for an appeal from the determination of the supervisors in laying out or discontinuing a highway shall state facts showing that the party is so specially affected by the determination as to entitle him to appeal.—*State v. St. Johns*, Minn., 50 N. W. Rep. 200.

59. HIGHWAY—Injuries.— Where a person who was driving along the highway after night struck a log, and was thrown from his wagon, sustaining a fracture of the leg, it was competent for him, in an action against the township, to give the result of measurements as to the size and height of the log, taken four weeks after the accident, where the accompanying testimony showed that the log was firmly imbedded in the earth, and that there was no probability in the meantime of a change of situation.—*Langworthy v. Township of Green*, Mich., 50 N. W. Rep. 130.

60. HOMESTEAD—Acquisition and Enforcement.—Code Miss. 1880, § 1248, allowing a homestead exemption in lands "owned and occupied" as a residence, requires that the right be founded, not merely on occupation, but on the ownership of some assignable interest; and a widow derives no right from her deceased husband to lands which were conveyed by him before his marriage, and which he was afterwards allowed to occupy merely as tenant at will.—*Berry v. Dobson*, Miss., 10 South. Rep. 45.

61. INJUNCTION—Violation of Contract.—One who has a contract with a gas company to furnish him, free of charge, for 20 years, with gas for all ordinary purposes in his dwelling, including two street lamps in front of the house and a gas-log in the library, can have a temporary injunction against the company to prevent it from wholly cutting off his gas supply; and the fact that plaintiff has used the gas extravagantly is no reason for refusing the injunction, as it would be an irreparable injury to him to be deprived of it wholly.—*Graves v. Key City Gas Co.*, Iowa, 50 N. W. Rep. 283.

62. INSURANCE — Severable Contract. — Where, in a policy of insurance, a separate valuation has been put upon the different subjects of insurance, as $300 on the dwelling-house, $175 on household furniture, $75 on barn, "$500 on horses, mules, and colts while in barn or on farm," etc., the contract is severable, and not entire and indivisible.—*Phenix Ins. Co. v. Grimes*, Neb., 50 N. W. Rep. 168.

63. INSURANCE—Waiver by Agent.—A forfeiture of an insurance policy having occurred from a breach of its conditions, an agent of the insurer, who has no knowledge or notice thereof, is not to be deemed to have waived the same by statements not intended to have such an effect, and where conditions do not exist constituting an estoppel.—*St. Paul Fire & Marine Ins. Co. v. Parsons*, Minn., 50 N. W. Rep. 240

64. INTOXICATING LIQUORS — Constitutional Law.—Chapter 110 of the Laws of 1891, entitled "An act to prescribe the penalties for the unlawful manufacture, sale, and keeping for sale of intoxicating liquors, and to regulate the sale, barter, and giving away of such liquors for medicinal, scientific, and mechanical purposes," is not in conflict with section 61 of article 2 of the State constitution, which provides that "no bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed."—*State v. Haas*, N. Dak., 50 N. W. Rep. 254.

65. JUDGMENT BY CONFESSION—Validity.—An application by a wife to set aside, as rendered in fraud of her, a judgment by confession rendered against her husband, pending her suit for divorce and alimony, is a suit for equitable relief, which cannot be granted on motion.—*Dullard v. Phelan*, Iowa, 50 N. W. Rep. 204.

66. LANDLORD AND TENANT—Rent.— Where a person rents a dock under an express contract, and is not disturbed in his possession, he cannot question the owner's right to recover for the rent by showing that a part of the dock is constructed in a street belonging to the city.—*Cunning v. Tittabawassee Boom Co.*, Mich., 50 N. W. Rep. 141.

67. LANDLORD'S LIEN—Bona Fide Purchaser.—A landlord, having knowingly permitted his tenant to sell wheat on which he had a landlord's lien, is estopped from asserting such lien against an innocent purchaser. —*Wright v. E. M. Dickey Co.*, Iowa, 50 N. W. Rep. 206.

68. LIMITATION — Accounting. — Where an attorney, after obtaining judgment for his client and levying execution thereon upon the debtor's land, receives from his client a power of attorney authorizing him to take possession of the land, rent and sell it, pay taxes and expenses, and divide the proceeds among several persons, and the attorney dies before he has completed his task, the statute of limitations does not begin to run against his liability to account until his death.—*Johnson v. McCain*, Penn., 22 Atl. Rep. 979.

69. LIMITATIONS—Attorney and Client.—Where a client from time to time deposits money with his attorney for investment, the statute of limitations will not begin to run against his right to recover such money as long as the relation of attorney and client continues.—*McCain v. Peart*, Penn., 22 Atl. Rep. 981.

70. LIMITATION OF ACTIONS — Acknowledgment of Debt.—Under Code Iowa, § 2539, providing that a cause of action founded on a contract is revived by an admission that the debt is unpaid, as well as by a new promise, an admission and a new promise are not both required to revive the cause of action, but either alone is sufficient.—*Stewart v. McFarland*, Iowa, 50 N. W. Rep. 221.

71. MASTER AND SERVANT—Assumption of Risk.—Application of the rule that a servant ordinarily assumes such risks of his employmrnt, because of an unsafe place or of unsafe appliances, as are manifest to the senses, or may be ascertained by a prudent use of them.—*Quick v. Minnesota Iron Co.*, Minn., 50 N. W. Rep. 244.

72. MASTER AND SERVANT—Assumption of Risk.—The plaintiff, employed in a mine as "trammer," was directed, and made no objection, to help the miners fix the roof of a "stope,"—take down some ground—and was injured by loose rocks or ore falling from a place in the roof that had been tested in his presence and appeared to necessitate blasting. Plaintiff had been tramming for four months from a stope in which there were frequent blastings, and knew that loose rock often fell from the roof and sides thereof: *Held*, that plaintiff assumed all the risk of the new duties and could not recover.—*Paule v. Florence Min. Co.*, Wis., 50 N. W. Rep. 189.

74. MECHANIC'S LIEN.—A partnership composed of three persons erected a building upon a lot owned by two of the partners. The partners, holding the legal title of the lot contracted in the name of the firm for the materials used in the construction of the building. In an action by the material man to foreclose his lien, it was held that the lien attached to the lot and building thereon.—*Hoagland v. Lusk*, Neb., 50 N. W. Rep. 162.

74. MORTGAGE — Non-exempt Property. — Where a mortgage covers both exempt and non-exempt property, the mortgagor has a right, both as against the mortgagee and as against a creditor having a lien, by judgment or the levy of an execution, upon the non-exempt property alone, to demand that the mortgagee first exhaust the non-exempt property before resorting to the exempt.—*Miller v. McCarty*, Minn., 50 N. W. Rep. 235.

75. MUNICIPAL CORPORATION—Change of Grade—Damages.—In an action for damages to property by a change in the grade of a street, instructions that the measure of damages is the cost of restoring the property to the exact condition it was in before the change of grade, less resulting benefits, are misleading, as not plainly and directly stating the rule that the difference in value of the property before and after the change of the grade is the measure of recovery.—*Stewart v. City of Council Bluffs*, Iowa, 50 N. W. Rep. 219.

76. MUNICIPAL CORPORATION—City Marshal — Fees.—Code Iowa, § 536, providing that a city marshal "shall receive the same fees as sheriffs and constables in similar cases," does not make the county liable for the fees of the city marshal in criminal cases.—*Guanella v. Pottawattamie Co.*, Iowa, 50 N. W. Rep. 217.

77. MUNICIPAL CORPORATION—Killing Dog Running at Large.—A dog may lawfully be killed by a police officer when running at large, contrary to an ordinance ordering all dogs confined, though it had just escaped, and was being pursued by plaintiff to return it to confinement.—*Julienne v. Mayor*, Miss., 10 South. Rep. 43.

78. MUNICIPAL CORPORATION—Opening Street—Validity of Ordinance.—A promise made by a citizen to pay a part of the expense of opening a street is not opposed to public policy, and an ordinance passed by a common council to open such street will not, upon that ground, be set aside.—*State v. Mayor*, N. J., 22 Atl. Rep. 1004.

79. NEGLIGENCE—Parent—Toy Gun.—*Held*, that a toy gun was not such an obviously dangerous weapon that it was negligence *per se* for defendant to put it into the hands of his son, and that he was not responsible in damages for the act of another boy who got possession of it without his knowledge.— *Chaddock v. Plummer*, Mich., 50 N. W. Rep. 135.

80. NEGOTIABLE INSTRUMENT — Fraud. — The payee named in a note procured the maker, who could not read, to sign it by fraudulently representing that it was payable to another person, to whom the maker was indebted: *Held*, the note in the hands of the payee was void.—*Schaller v. Borger*, Minn., 50 N. W. Rep. 247.

81. NEGOTIABLE INSTRUMENT—Nature and Requisites —Indorsement — Presumption. — An instrument executed by the vendee of personal property, by which he promises to pay therefor a certain sum at a time stated, but which expresses that the sale is upon condition, and may be rescinded by either party, is not a negotiable promissory note, since it does not require the payment to be made absolutely and at all events.—*First Nat. Bank v. Alton*, Conn., 22 Atl. Rep 1010.

82. PARTNERSHIP.—In an action to charge stockholders in a bank as partners, the burden is not on defendants to show that the bank was incorporated, or was a limited partnership, but is on plaintiff to show that it was a partnership, as alleged in his complaint.—*Hallstead v. Curtis*, Penn., 22 Atl. Rep. 977.

83. PARTNERSHIP— Accounting.—Where two partners, whose joint business has been carried on for years in the name of one of them, agree in writing that all the property held by the managing partner shall be held to belong equally to both of them, the surrender of the right to an account is a good consideration for the agreement on the part of the managing partner.—*McCullough v. Barr*, Penn., 22 Atl. Rep. 962.

84. PRACTICE—Motion for New Trial.—Where a copy of a motion for a new trial is not filed at the same time as the original, as required by Rules Prac. Dist. Ct. Iowa, Jan. 5, 1887, the motion may be stricken from the files, under this rule, although the copy is filed before it is called for by the adverse party.—*Burgit v. Case*, Iowa, 50 N. W. Rep. 218.

85. PRINCIPAL AND SURETY—Appeal-bond.—The omission of the name of the surety from the face of an appeal bond and from its recitals does not release him from liability if he signs the bond and justifies as surety.—*Case v. Daniels*, Colo., 27 Pac. Rep. 886.

86. PUBLIC LANDS—Pre-emption.—Act. Cong. March 3, 1877, § 2, relative to territories, confirmed all entries which had been theretofore allowed upon lands "afterwards ascertained" to have been embraced in the corporate limits of any town, but which entries are or shall be shown to include only unoccupied lands of the United States, not used for municipal purposes: *Held*

that an entryman was not presumed to know the limits of any town incorporated by a territorial legislature, since, otherwise, no land could have been "afterwards ascertained" by him to have been embraced in the corporate limits of any town, and section 2 of the act could have no possible application.—*Alger v. Hill*, Wash., 27 Pac. Rep. 922.

87. RAILROAD—Overhead Street Crossings.—Where a railroad company, for the purpose of approaches to an overhead street crossing, constructs embankments in the street that extend in front of plaintiff's lots, he is entitled to recover damages sustained thereby, under Code Iowa, § 464, which provides that no railroad company shall occupy a street until the resulting injury to property abutting thereon has been ascertained and compensated.—*Nicks v. Chicago, etc. Ry. Co.*, Iowa, 50 N. W. Rep. 222.

88. RAILROAD COMPANIES—Killing Stock.—A railroad engineer cannot take chances of an animal getting off of the track, where he has an opportunity of easily avoiding all possibility of an injury.—*Elmsley v. Georgia Pac. Ry. Co.*, Miss., 10 South. Rep. 41.

89. RAILROAD COMPANIES—Liability for Torts of Servant.—Under Act Miss. Feb. 22, 1890, which provides that station agents of railroad companies shall preserve order in the waiting rooms, and may arrest and deliver to some officer all persons guilty of disorderly conduct, the acts of such agents are imputable to the company.—*King v. Illinois Cent. R. Co.*, Miss., 10 South. Rep. 42.

90. RAILROAD COMPANIES — Negligence. — The duty which a railroad corporation owes to section hands employed in taking care of its road-bed is that of ordinary care, and what constitutes such care varies with varying circumstances.—*Britton v. Northern Pac. R. Co.*, Minn., 50 N. W. Rep. 231.

91. RAILROAD COMPANIES—Negligence—Cattle Guard Fences.—A brakeman, seeing stones thrown from under a moving car, stood on a ladder on the side of the car, and leaned down to ascertain the cause, and was struck and killed by a "wing fence" of a cattle guard, placed three feet ten inches from the rails. Such an accident had never before occurred before on the road: *Held*, that the company was not guilty of negligence in erecting the fences at that distance from the rails, as the accident was not one likely to occur or reasonably to be apprehended.—*McKee v. Chicago, R. I. & P. Ry. Co.*, Iowa, 50 N. W. Rep. 209.

92. REAL ESTATE AGENT.—A letter authorizing agents to sell land for $2,200 "provided that the party could pay $700 down and the balance in one, two, and three years," did not authorize them to sell for $1,000 down and the balance in one and two years.—*Speer v. Craig*, Colo., 27 Pac. Rep. 891.

93. RECEIVER—Ex parte Application.—The practice of appointing receivers *ex parte* is not tolerated by the courts except in cases of the gravest emergency, and to prevent irreparable injury.—*Grandin v. La Bar*, N. Dak., 50 N. W. Rep. 151.

94. REPLEVIN—Damages.—In an action of replevin to recover the possession of horses, the court properly admitted testimony of the amount of expenses incurred by plaintiff in searching for and endeavoring to retake the horses from defendants, as special items of damage over and above the value of the property.—*Parroski v. Goldberg*, Wis., 50 N. W. Rep. 191.

95. RES JUDICATA—Pleading.—The party relying upon a former adjudication as a defense must aver in his answer in what court the judgment was rendered, and plead facts showing that the recovery was upon the same subject-matter, and between the same parties or their privies, as the suit in which the defense of *res judicata* is made, and that the judgment is in full force.—*Thomas v. Thomas*, Neb., 50 N. W. Rep. 170.

96. REVIEW—Matters not Apparent on Record—Appeal—Stipulations.—A decree rendered on an intervention filed after the foreclosure of a railroad mortgage, and directing the payment of intervenors' claim for a vendor's lien in the absence of evidence on which it was based, must be affirmed, when the decree shows that the company purchased certain lands from interveners, and held them as part of its right of way, though no deeds were ever executed; that the vendor's lien was superior to the lien of the mortgage; and it further appears that the decree of foreclosure ordered the sale of all the company's right of way.—*Knee land v. Luce*, U. S. S. C., 12 S. C. Rep. 39.

97. SALE—Parol Evidence.—A written order for goods (elevator and engine) to be sent and put up, specifying the price and terms of payment, a condition as to the title remaining in the vendor until payment should be made, with other provisions—the property having been sent pursuant thereto, and appropriated and used by the purchaser, *held* to be on its face a complete contract binding upon the purchasers, and excluding proof that the prior oral agreement was different therefrom.—*American Manuf'g Co. v. Klarquist*, Minn., 50 N. W. Rep. 243.

98. SALE OF LAND—Evidence of Rescission.—Where one held land as owner under a written contract of purchase for 17 years and until his death, paying a part of the purchase price each year, making valuable improvements, and paying the taxes, his heirs will not be ousted by the grantor on a claim of a parol rescission of the contract and of a tenancy, the terms of which are indefinite, and can only be gleaned from conflicting testimony.—*Carter v. Munn*, Ark., 17 S. W. Rep. 445.

99. SALE ON APPROVAL.—A condition of a contract for the sale of a harvesting machine, that it should be returnable, if defective, only before the harvesting season was over, was waived when, at the vendor's request, it was kept until the next season, to be given a further trial; and it could then be returned for the same causes as before.—*Snody v. Shier*, Mich., 50 N. W. Rep. 252.

100. SCHOOLS — Teachers — Evidence.—Where, in an action by a teacher against a school district for his salary, the defense is that he was discharged by the board on account of cruelty to a pupil, the minutes of the board are the best evidence of the teacher's dismissal, and therefore oral evidence as to his acts of cruelty is inadmissible.—*Whitehead v. School District of North Huntingdon Tp.*, Penn., 22 Atl. Rep. 991.

101. SLANDER—Evidence.—In an action for slander, in order to prove the uttering of the words, the plaintiff may prove defendant's plea of guilty in a criminal proceeding in the warrant in which the slanderous words were, in substance and meaning, though not literally, set forth as the basis of the criminal charge.—*Wischstadt v. Wischstadt*, Minn., 50 N. W. Rep. 225.

102. SPECIFIC PERFORMANCE—Evidence.—Specific performance of a lost written agreement concerning land will not be decreed where the only evidence as to the terms of the agreement is given by a witness who had not seen it for 23 years before the trial, and who only professed to be able to give what he considered its principal points.—*Vanhorn v. Munnell*, Penn., 22 Atl. Rep. 985.

103. SUMMONS—Service on Foreign Corporation.—Defendants' general agents appointed a subagent, and directed him to sign all papers of importance, "C A & Co. [principals], by W G & W B General Agents, by S." (subagent). The subagent proceeded to sell machinery and settle accounts in the name of the principal, who recognized his settlements and received the benefit of his services. *Held*, that service of a summons on such agent was sufficient, under Rev. St. Wis. § 2637, subd. 11, providing for services of summons against a foreign corporation, on any agent "having charge of or conducting any business therefor in this State."—*Burgess v. C. Aultman & Co.*, Wis., 50 N. W. Rep 175.

104. TAXATION—Exemption.—The inventors and owners of certain appliances for the transmissions of sounds (telephone), in consideration of certain shares of stock to be issued to them by defendant company, agreed that the latter should have the exclusive right to use such appliances in certain territory, the invent-

ors and owners reserving the right to sell the privilege of using the same everywhere except in that territory, and also the ownership of the appliances actually used: *Held* that the stock of defendant company, issued to such inventors and owners was not an investment in "patent rights," within the laws of the United States exempting from taxation the capital stock of a company invested in patent rights.—*Commonwealth v. Central District & Printing Telegraph Co.*, Penn., 22 Atl. Rep. 841.

105. TAX TITLES—Description of Land.—In proceedings to enforce real estate taxes, the fact that the ownership of the land is erroneously stated in the published list will not invalidate the judgment. It is a sufficient description of land to state the township and range in headings or cross-lines, instead of opposite the descriptions of the subdivisions of sections, provided it clearly appears from the published list whether the cross-line refers to the descriptions following or those preceding it.—*McQuade v. Jaffray*, Minn., 50 N. W. Rep. 233.

106. TAX TITLES—Estoppel.—Where persons purchase land from one holding tax deeds therefor regular on their face, in good faith and without notice of any illegalities in the tax sales, and go into possession, cultivate the land, and pay taxes thereon for nearly 20 years, the former owner of the land, who remains quiet during all this time, though he knows all the facts, and has also been informed that the tax sales were void, is estopped to assert his title against them.—*Mathews v. Culbertson*, Iowa, 50 N. W. Rep. 261.

107. TRESPASS BY OFFICERS—Justification under Writ.—If the court out of which the issued has, by its constitutional and fundamental law, jurisdiction—that is, power to take cognizance of and determine such a cause of action as that in which the process was awarded, and authority of law to issue process of that nature, either generally or in particular cases, and the writ be regular on its face, the writ itself will be a full justification for acts done by the officer in its lawful execution.—*Jennings v. Thompson*, N. J., 22 Atl. Rep. 1008.

108. TRIAL — Gambling Verdict.—Where the jurors placed different amounts upon their ballots, and added them together, and divided the sum by 12, the verdict was not reached by a resort to the determination of chance, and therefore it could not be impeached by affidavits of the jurors.—*Marriner v. Dennison*, Cal., 27 Pac. Rep. 927.

109. TRUST—Bona Fide Purchaser.—Under How. St. Mich. § 5572, which provides that no resulting trust shall be established to prejudice the title of a *bona fide* purchaser, where it appeared that one B voluntarily quitclaimed an undivided one-half interest in land, in which he held a one-quarter interest in trust for complainant, to his daughter (defendant's wife), and the daughter deeded to defendant, and afterwards defendant purchased the other one-half interest from the wife of B, as executrix of B's estate, as there was evidence, though conflicting, that defendant had knowledge of complainant's interest in the land, defendant was not an innocent purchaser.—*Ripley v. Seligman*, Mich., 50 N. W. Rep. 141.

110. USURY.—An answer setting up the defense of usury must state the particular facts of the alleged agreement in order that the court may see that it was in violation of the statutes of the State. It was not sufficient to allege that the "bond was given in payment of usurious interest by a contract for the payment of the same."—*Anglo-American, Land, Mortgage & Agency Co. v. Brohman*, Neb., 50 N. W. Rep. 271.

111. USURY—Limitation of Actions.—Where the maker of a note drawing interest at 10 per cent. until maturity paid after maturity, on a final settlement, interest at the same rate, which he claimed was by mutual mistake, an action for the recovery of the usury paid must be brought within one year from the payment, under the laws of Kentucky.—*Spencer v. Mathews*, Ky., 17 S. W. Rep. 433.

112. VENDOR AND VENDEE — Defective Title. — If it clearly appears from an executory contract for the sale of real property, taken in connection with the allegations found in a pleading, the sufficiency of which is in issue, that the parties contemplated and bargained for nothing more than a conveyance which would pass such rights and interests as the vendor might have or that they had in view, and contracted for the mere transfer of the title held by the vendor, whether defective or not, that is all a vendee can claim or insist upon.—*McManus v. Blackmarr*, Minn., 50 N. W. Rep. 230.

113. VENDOR AND VENDEE— Parol Evidence.—In an action by a vendee to recover from his vendor the rents collected by the latter after the conveyance, it is admissible for the vendor to show a parol contract made at the time of the sale agreeing to the collection, when the rents were regarded by the court as a part of the consideration.—*Bourne v. Bourne*, Ky., 17 S. W. Rep. 443.

114. WATERS—Riparian Rights—Diversion.—The owner of land through which flows a stream of water suitable for a mill-site, but on which there is no mill, may recover, from one who diverts the water, any actual injury he suffers therefrom in the enjoyment of his land, but cannot recover for the loss of water power which he has neither used nor attempted to use.—*Clark v. Pennsylvania R. Co.*, Penn., 22 Atl. Rep. 989.

115. WILL—Construction.—An error in the description in a will, either of the legatee, or of the subject matter of the devise, will not avoid the will if sufficient remain to show with reasonable certainty what was intended.—*Seebrock v. Fedawa*, Neb., 50 N. W. Rep. 270.

116. WILL—Construction.—A testator in one clause of his will devised certain land to his daughter and her heirs. In a later clause of the will he provided as follows: "If either of my said children shall die without leaving lawful issue living at the time of his or her death, then, and in that event, all the real estate, personal property, money, and property herein or hereby devised, given, or bequeathed to the child so dying, shall go, pass to, and become vested in the surviving child, absolutely and in fee-simple:" *Held*, that the daughter surviving the testator took said land in fee-simple, the qualifying clause only referring to the contingency of her dying before the testator.—*Morrison v. Truby*, Penn., 22 Atl. Rep. 972.

117. WILL—Construction.—A testator provided that, whereas he had made an antenuptial contract with his wife, his son, who was executor and residuary legatee, should pay his widow the interest on the sum secured her by the antenuptial agreement, and also the interest on a further sum bequeathed by the will. There were other legacies under the will: *Held*, that the legacy to the widow was a charge on the estate, and that the executor and residuary legatee was not personally liable for it.—*Pitkin v. Peet*, Iowa, 50 N. W. Rep. 282.

118. WILL— Construction. —A use for the sole and separate benefit of a woman who at the date of the execution of the will was neither married nor in contemplation of marriage, but who was married when testator died, is void, and the devise vests absolutely and free therefrom.—*In re Quinn's Estate*, Penn., 22 Atl. Rep. 965.

119. WILL—Nature of Estate Devised.—A will directing the executors to sell testator's land, and to divide the proceeds equally among his children, does not by implication vest the executors with title to the land; and consequently the title and right to possession remain in the heirs until the sale, and they are the proper parties to maintain ejectment for the land.—*Cohea v. Jemison*, Miss., 10 South. Rep. 46.

120. WITNESS—Transactions with Decedents.—Where, in a suit against one member of a firm and the estate of a deceased member, the partnership is denied by defendant estate, the surviving partner is not a competent witness to prove the partnership, under Mills' Ann. St. Colo. ch. 132, § 4816.—*Cooper v. Wood*, Colo., 27 Pac. Rep. 884.